REPORTS OF CASES

DECIDED BETWEEN

OCTOBER 31, 1986 and MARCH 19, 1987

IN THE

Supreme Court of Nebraska

VOLUME CCXXIV

DONALD C. PATTON

OFFICIAL REPORTER

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

1988

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By Donald C. Patton, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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Number of District	Counties in District	Judges in District	City
First	Johnson, Pawnee, Nemaha, and Richardson	Robert T. Finn	Tecumseh
Second	Sarpy, Cass, and Otoe	Ronald E. Reagan	Papillion
		Raymond J. Case	Plattsmouth
		George A. Thompson	Papillion
Third	Lancaster	Robert R. Camp	Lincoln
		William D. Blue	Lincoln
		Dale E. Fahrnbruch	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
Fourth	Douglas	Donald J. Hamilton	Omaha
		James A. Buckley	Omaha
		John E. Clark	Omaha
		James M. Murphy	Omaha
		Jerry M. Gitnick	Omaha
		Paul J. Hickman	Omaha
		Keith Howard	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
Fifth	Hamilton, Polk, York, Butler, Seward, and Saunders	William H. Norton	Osceola
		Bryce Bartu	Seward
Sixth	Burt, Thurston, Dodge, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
Seventh	Fillmore, Saline, Thayer, and Nuckolls	Orville L. Coady	Hebron

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Eighth	Dakota, Dixon, and Cedar	Robert E. Otte	Dakota City
Ninth	Knox, Antelope, Cuming, Pierce, Madison, Stanton, and Wayne	Merritt C. Warren Richard P. Garden	Creighton Norfolk
Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster	Bernard Sprague William G. Cambridge	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin William H. Riley	Grand Island Grand Island
Twelfth	Sherman and Buffalo	DeWayne Wolf	Kearney
Thirteenth	McPherson, Logan, Lincoln, Dawson, Keith, Arthur, Hooker, and Thomas	Donald E. Rowlands II John P. Murphy	North Platte North Platte
Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy	Jack H. Hendrix	McCook
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Eighteenth	Jefferson and Gage	William B. Rist	Beatrice
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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 44520: **Thompson v. Serve All Services Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-324: **Weber v. Hopkins.** Stipulation allowed; appeal dismissed.

No. 85-646: **Lorimer v. Lorimer.** Stipulation allowed; appeal dismissed with prejudice at cost of appellant.

No. 85-969: **Kurtz v. Marquardt.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-003: **Newton v. City of Omaha.** Joint motion to remand with directions approved.

No. 86-025: **First National McCook Company v. Klein.** Stipulation allowed; appeal and cross-appeal dismissed.

No. 86-026: **Kuhlman v. Grimminger.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-114: **Central National Ins. Co. v. Omaha Indemnity Company.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 86-150: **Dougherty v. Shortridge.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 86-163: **State v. Smith.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-170: **State v. Kelly.** By order of the court, appeal dismissed for want of jurisdiction.

No. 86-194: **First National Bank in Morrill v. Adams.** Stipulation allowed; appeal dismissed.

No. 86-206: **F.T.C., Inc. v. Jones.** Stipulation allowed; appeal dismissed.

No. 86-256: **McVoy v. Nebraska Liquor Control Commission.** Stipulation allowed; appeal dismissed.

Nos. 86-311, 86-312: **Mason State Bank v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-346: **Kuhlman v. Grimminger.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-363: **State v. Graber.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-366: **State v. Byram.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-392: **Dodge v. Smith.** Stipulation allowed; appeal dismissed.

No. 86-429: **Hupf v. Hupf.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-431: **State v. Johnson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-438: **Eaton v. Lutheran Medical Center.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 86-451: **State v. Garcia.** Judgment affirmed; see Rule 7A.

No. 86-463: **State v. Hudnall.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-464: **State v. Reed.** Motion of appellee for summary dismissal sustained; appeal dismissed as out of time; see Rule 7B(1).

No. 86-469: **State v. Sanders.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-470: **State v. Williams.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 86-480: **In re Interest of L.W.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule

7B(2).

No. 86-505: **Brill v. Brill.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-530: **Field v. Jensen.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-537: **State v. Wykoff.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-538: **State v. Dorzweiler.** Judgment affirmed; see Rule 7A.

Nos. 86-543, 86-563: **State v. Melton.** Judgment affirmed; see Rule 7A.

Nos. 86-554, 86-555: **State v. Moore.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-560: **Martinez v. State.** On stipulation of the parties, case remanded to the district court for Douglas County, Nebraska.

No. 86-567: **Harris v. Mastercraft Furniture Corp.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-568: **State v. Hunt.** Judgment affirmed; see Rule 7A.

No. 86-576: **Coyle v. Coyle.** Stipulation of settlement approved. Appeal dismissed and cause remanded to the Douglas County District Court with instructions to modify decree in conformity with terms of stipulation.

No. 86-579: **State v. Jefferson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-589: **State v. Bick.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-591: **State v. Britain.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-592: **State v. Fry.** Court finds appeal wholly

frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-602: **State v. Gartner.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-603: **State v. Reed.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-619: **State v. Gustafson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-620: **State v. Brock.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-622: **State v. Bass.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-624: **State v. Rankin.** Judgment affirmed; see Rule 7A.

No. 86-627: **State v. Rohde.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-628: **Huck v. Huck.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-630: **State v. Cottrell.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-631: **State v. Coon.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-632: **Wegner v. Grammar.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule

3B.

No. 86-633: **Lee v. Gregg.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-634: **State v. Clark.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-635: **State v. Clark.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-636: **State v. Rich.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-640: **State v. Welsh.** Judgment affirmed; see Rule 7A.

No. 86-643: **State v. Madsen.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-644: **State v. Colbert.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-645: **Hannibal v. Ames Center Realty, Inc.** Stipulation allowed; appeal dismissed.

No. 86-647: **Raschke v. State.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-654: **State v. Hatcher.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-658: **State v. Abel.** Judgment affirmed; see Rule 7A.

No. 86-659: **In re Estate of Peverill.** Stipulation allowed; appeal dismissed.

No. 86-663: **State v. Harrington.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-665: **State v. Shaul.** Judgment affirmed; see Rule 7A.

No. 86-666: **Lammers v. Lammers.** Stipulation allowed; appeal dismissed.

No. 86-670: **Central Waste Systems, Inc. v. Shields.** Stipulation allowed; appeal dismissed.

No. 86-672: **State v. Hutchinson.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-673: **State v. Manchester.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-674: **State v. Clark.** Court finds appeal wholly

frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-676: **State v. Armour.** Motion of appellee for summary affirmance sustained. Judgment affirmed; see Rule 7B(2).

No. 86-688: **Woods v. County of Douglas.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 86-690: **State v. Hernandez.** Stipulation allowed; appeal dismissed.

No. 86-695: **Fritz v. Baker's Supermarkets, Inc.** Stipulation allowed; appeal dismissed with prejudice.

No. 86-698: **State v. Bean.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-703: **State v. Young.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-707: **Dop v. American Family Mutual Ins. Co.** Stipulation allowed; appeal dismissed.

No. 86-708: **State ex rel. Carter v. Grammer.** Judgment affirmed; see Rule 7A.

No. 86-714: **State v. Wendell.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-715: **State v. Robinson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-716: **In re Interest of Crawford.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-717: **Lake v. Lake.** Stipulation allowed; appeal dismissed.

No. 86-719: **State v. Lott.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule

3B.

No. 86-726: **State v. Foreman.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-730: **State v. Winchester.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-731: **State v. Sullivan.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-735: **State v. Clark.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-736: **State v. Young.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-737: **State v. Gruhn.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-738: **State v. Farber.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-739: **State v. Straughn.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-740: **State v. Kehoe.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-749: **State ex rel. Taylor v. Gunter.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-750: **Hedman v. Hesser.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-751: **Ansley Ready-Mix, Inc. v. McAlvey.** Stipulation

allowed; appeal dismissed.

No. 86-753: **Ritchey v. Square D Company.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 86-754: **American Standard Ins. Co. v. United States Fidelity & Guaranty Ins. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-755: **Haiar v. County of Douglas.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 86-756: **State v. Mulder.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-757: **State v. Onnen.** Judgment affirmed; see Rule 7A.

No. 86-758: **Meints v. Meints.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 86-761: **Bank of the Midlands v. Hogan.** Stipulation allowed; appeal dismissed.

No. 86-766: **Bank of Burwell v. Seidel.** Stipulation allowed; appeal dismissed.

No. 86-771: **State v. Jacob.** Judgment affirmed; see Rule 7A.

No. 86-774: **State ex rel. Hartmann v. Ford.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-776: **State v. Burns.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-778: **State v. Pickens.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-782: **Grosshans v. Board of Education.** Stipulation allowed; appeal dismissed.

No. 86-784: **State v. Scholl.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-785: **In re Application of Northwestern Bell.** Stipulation for remand and dismissal approved. Motion to dismiss appeal sustained; appeal dismissed.

No. 86-789: **Insurance Co. of Illinois v. United Fire and Casualty.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

Nos. 86-794, 86-797: **State v. Donaldson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-795: **State v. Lupino.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-796: **State v. Jones.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-802: **Goreham v. Ozbay.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 86-808: **State v. Mayes.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-810: **State v. Nelson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-813: **State v. Rein.** Judgment affirmed; see Rule 7A.

No. 86-818: **Ginn v. Ginger Cove Improvement Assn.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-821: **State v. Mueller.** Judgment affirmed; see Rule 7A.

No. 86-822: **State v. Collins.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-824: **In re Interest of Kessler.** Motion of appellant to

dismiss appeal sustained; appeal dismissed.

No. 86-828: **Lenco v. Slama.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice; each party to pay own costs.

No. 86-829: **State v. Hurbenca.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-832: **State v. Loper.** Judgment affirmed; see Rule 7A.

No. 86-838: **Case v. Stevens.** Stipulation allowed; appeal dismissed.

No. 86-841: **Park Place Pontiac v. Nebraska Motor Vehicle Industry Licensing Board.** Motion of appellant to dismiss appeal sustained; appeal dismissed and the 24-hour period of suspension of appellant's dealer's license No. DL-712 shall be from 10 p.m. on December 23, 1986, to 10 p.m. on December 24, 1986.

No. 86-849: **Osborne v. Rojas.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-851: **Lonnie's Ladder, Inc. v. Sorensen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-857: **Beef Nebraska, Inc. v. Volcek.** Stipulation allowed; appeal dismissed with prejudice.

No. 86-861: **State v. Dennis.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-862: **Delgadillo v. Prime International.** Stipulation allowed; appeal dismissed.

No. 86-863: **Central Soya Co. v. Land & Cattle Enterprises.** Stipulation of settlement approved; motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-864: **Leesley v. Jensen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-865: **Federal Land Bank of Omaha v. Shanahan Farms, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-866: **Keith County Bank & Trust Co. v. Corman.** Stipulation approved; affirmed as modified.

No. 86-868: **Braunbeck v. Des Enfants.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-871: **Moos v. City of Omaha.** Stipulation allowed; appeal dismissed.

No. 86-872: **Scherer v. Ragsdale.** Stipulation allowed; appeal dismissed with prejudice per the terms of the stipulation.

No. 86-873: **Costello v. Costello.** Stipulation allowed; appeal dismissed.

No. 86-874: **Tachovsky v. Tachovsky.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 86-878: **Johnson v. Grammer.** Stipulation allowed; appeal dismissed.

No. 86-882: **State ex rel. Sullivan v. Grammer.** Judgment affirmed; see Rule 7A.

No. 86-898: **Hicks v. Sikes.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-900: **Gauthier v. Harvest Commodities, Inc.** Stipulation of settlement approved; appeal dismissed as per terms of stipulation.

No. 86-901: **Goding v. Heritage Village of Grand Island.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-914: **Janes v. Ford Motor Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-919: **State v. Skarsvog.** Judgment affirmed; see Rule 7A.

No. 86-921: **Bank of Dixon County v. Farmers Coop. Assn.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-922: **Kaup v. National Farms, Inc.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-925: **State v. Watson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-926: **State v. Blackwood.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule

3B.

No. 86-927: **State v. Budd.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-930: **Packers Engineering v. City of Omaha.** Stipulation allowed; appeal dismissed.

No. 86-935: **State v. Lofton.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-937: **State v. Holroyd.** Judgment affirmed; see Rule 7A.

No. 86-943: **In re Interest of Stabler.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-949: **Frazier v. Burlington Northern Railroad Co.** Stipulation allowed; appeal dismissed with prejudice.

No. 86-952: **Boro v. Woodward.** Stipulation allowed; appeal dismissed.

No. 86-953: **Chalupa v. Chalupa.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-955: **State v. Kirtley.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-960: **State v. Chrisley.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-962: **State v. Armfield.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-963: **State v. Reed.** Judgment affirmed; see Rule 7A.

No. 86-971: **Schiro v. Spic and Span Linen Supply.** Stipulation allowed; appeal dismissed.

No. 86-973: **State v. Miller.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-980: **Trujillo v. Vitek.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-983: **Neilsen v. Carney.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 86-1000: **In re Estate of Kunz.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 86-1021: **State v. Johnson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-1024: **Ackerman v. Ackerman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-1048: **State v. Taylor.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-1062: **State v. Williams.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-1069: **Valmont Industries, Inc. v. Omaha National Bank.** Stipulation of settlement approved. Cause is remanded to the Douglas County District Court to implement the terms and provisions of the settlement agreement.

Nos. 86-1070, 86-1071: **Anderson v. Payne.** Stipulation allowed; appeal dismissed.

No. 86-1084: **Barnett v. Magner.** Stipulation allowed; appeal dismissed.

No. 86-1092: **Teeter v. Brendle.** Stipulation allowed; appeal dismissed.

No. 87-013: **Dvorak v. Dunning.** Stipulation allowed; appeal dismissed.

No. 87-029: **State ex rel. Tyler v. Gunter.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-072: **In re Interest of Tyler.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

NANCY D. VICE, APPELLANT, V. DARM CORPORATION, A NEBRASKA CORPORATION, APPELLEE.

395 N.W.2d 524

Filed October 31, 1986. No. 85-456.

1. **Directed Verdict.** A directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence, that is, when the controversy is properly resolved as a matter of law.
2. _____. In considering a motion for a directed verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.
3. **Innkeepers: Liability: Negligence.** The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Rodney J. Rehm of Rehm & Bartling, for appellant.

Steven E. Guenzel of Barlow, Johnson, DeMars & Flodman, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

Plaintiff-appellant, Nancy D. Vice, alleges that defendant-appellee, Darm Corporation, negligently permitted her to be injured during a fight at its bar. At the close of all the evidence, the district court sustained defendant's motion for a directed verdict and entered a judgment dismissing plaintiff's petition. Plaintiff's assignments of error challenge the correctness of the district court's judgment, contending that there existed questions of fact for the jury to decide. We affirm.

On November 22, 1980, plaintiff watched a football game on television with friends in her apartment. After the game they went to Oscar's, a bar in Lincoln owned by defendant. In the crowded bar plaintiff's roommate, Mary Jo O'Grady, directed plaintiff's attention to Rhonda Cudney, who had watched the game with plaintiff. Rhonda Cudney had Kelly McCarthy, who was in tears, pushed up against the wall. Although the evidence is vague, it appears Kelly McCarthy had blamed Rhonda Cudney for throwing a beer at her, and Rhonda Cudney may have slapped Kelly McCarthy.

Donald Arena, president and secretary of the defendant corporation and full-time manager of Oscar's, heard the two women arguing and went to see what the problem was. He testified that the women indicated there was no problem, only a misunderstanding, and that they apologized to him. Plaintiff went over to talk to Rhonda Cudney to see if she was all right, after which the three women remained in the bar.

Arena further testified that he watched the tables where Kelly McCarthy and Rhonda Cudney were each sitting but that he was not overly concerned because "[v]ery, very seldom do you have women get up and start knocking each other around." In fact, Oscar's had never experienced a fistfight between two women. Arena believed the incident was a momentary thing, maybe a misunderstanding, that it was sufficiently settled, and that it was not a problem. Plaintiff herself testified that she was not worried, and other patrons testified that they were not worried for their safety.

Sometime after the disturbance involving the two women, their brothers, David Cudney and Mike McCarthy, arrived at the bar. David Cudney sat with his sister at the "Cudney table,"

and Mike McCarthy sat at the "McCarthy table." Plaintiff was seated somewhere in the vicinity of the two tables. (It is difficult to determine exactly where plaintiff was sitting, for, while a drawing was used during the course of the trial and while the index to the bill of exceptions states that the drawing and a variety of other exhibits are contained in separate volumes to the bill of exceptions, those volumes were not filed with the clerk of this court. See Neb. Ct. R. of Prac. 5C(5) and 5F (rev. 1986), dealing with the responsibility for filing and the proper placement of exhibits in a bill of exceptions. Nonetheless, we have, in this instance, reviewed the case, as the missing exhibits do not appear to bear in any crucial way on the question involved.)

The exchange of words between the Cudney table and the McCarthy table escalated until, about an hour after the disturbance involving the two women, David Cudney was seen to "fly" over a table, and a physical fight broke out between the brothers. There is no evidence the exchanges between the two tables were such that Arena was or should have been aware of them. After the brothers began to fight, others also became involved, but it is not clear whether they were participating in the fight or trying to break it up.

When the fight started, plaintiff decided to go to the restroom and wait it out. As she was getting up from her chair, some unknown person knocked her to her knees, and she was severely injured. The fight stopped when those involved realized that plaintiff had been hurt.

This review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence, *Bourke v. Watts*, 223 Neb. 511, 391 N.W.2d 552 (1986), that is, when the controversy is properly resolved as a matter of law. *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 390 N.W.2d 536 (1986). Further, in considering a motion for a directed verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.

Myers, Trustee v. National Transp., Inc., 223 Neb. 688, 393 N.W.2d 43 (1986).

This court recently considered the liability of a business proprietor to a patron in *Harvey v. Van Aelstyn*, 211 Neb. 607, 319 N.W.2d 725 (1982). Therein, another bar customer, without prior warning, grabbed and shoved the assaulted patron's dancing partner aside with such force as to propel her to the floor, and immediately thereafter struck the patron in the face, severely injuring him. In sustaining a directed verdict in favor of the bar owner, *Harvey* relied upon *Hughes v. Coniglio*, 147 Neb. 829, 25 N.W.2d 405 (1946), and the Restatement (Second) of Torts § 344 (1965), and applied the rule that

> "the proprietor of a place of business who holds it out to the public for entry for his business purposes, is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm. . . ."

Harvey at 611-12, 319 N.W.2d at 727-28.

Hughes affirmed a judgment of dismissal entered at the close of the patron's evidence. The patron was stabbed, just as he entered defendant's restaurant, as the result of a fight between two other customers. In reaching its decision the *Hughes* court noted that the altercation happened suddenly, unexpectedly, and without warning and that there had been no prior history of altercations.

The tavern owner in *Welsh v. Zuck*, 192 Neb. 1, 218 N.W.2d 236 (1974), maintained a firing range under the bar. A customer who used the range kept his gun at the bar. On the day in question the customer took the unloaded gun from the bar, left the bar, loaded the gun, and returned within the hour. Thinking that he heard some disparaging remarks concerning his wife, the customer took out the gun to fire it in the air. Another customer attempted to disarm him, and a bystander patron was

injured when the gun went off in the ensuing struggle. In concluding that the trial court erred in not directing a verdict for the tavern owner, this court stated:

> It seems clear that the primary or proximate cause of the accident in this case was not the knowledge of the tavern owner that Rima prior thereto had a gun on the premises, but the acts of the defendant Rima in reloading the gun after leaving the tavern, returning to the tavern, and engaging in the fight which has been described. There was no possible way that defendant Zuck could have foreseen that the above events would transpire; nor was there any possible or reasonable way for him to have prevented what eventually happened.

Id. at 9, 218 N.W.2d at 241.

The patron in *Crane v. Whitcomb*, 160 Neb. 527, 70 N.W.2d 496 (1955), was shot outside the tavern by the tavern owner's husband following an altercation which began inside the tavern. In reversing a judgment for the patron, this court noted that the patron had left the premises because he thought the husband was going to get a gun, and then drove back to the bar when the husband called for him. The shooting took place in a struggle outside the bar. Although the *Crane* court discussed the patron's own contributory negligence, it concluded that the owner had not been negligent.

However, questions for the jury both on the issue of the bar's negligence and the patron's contributory negligence were presented in *Fimple v. Archer Ballroom Co.*, 150 Neb. 681, 35 N.W.2d 680 (1949). Therein, a female patron attending a New Year's Eve dance was injured by a beer bottle which was thrown at her from a table of boisterous veterans. In celebrating their reunion the veterans had become intoxicated, and over a period of 1½ hours used loud and profane language, broke several glasses, and threw a whiskey bottle. Throughout the 1½ hours preceding the incident resulting in her injuries, the patron had been sitting next to the table from which the bottle was thrown.

The law as developed in the foregoing cases leads to the conclusion that the district court correctly determined that as a matter of law the argument between Rhonda Cudney and Kelly McCarthy did not make it foreseeable that their brothers would

later arrive and get involved in a fight, at the start of which plaintiff would be injured. Unlike the situation in *Fimple*, there was not in the present case a continuing disturbance for such a length of time as to have warned defendant that the safety of its patrons was at risk. On the contrary, the initial disturbance involving the two women had subsided; plaintiff was injured just as a sudden and unexpected fight broke out without warning between the brothers.

Furthermore, there is absolutely no showing that plaintiff was knocked down as a consequence of the fight. It would be no more speculative to conclude that she was accidentally knocked down by someone who was not involved in the fight. Thus, not only was the defendant not negligent but plaintiff failed to show that the fight proximately caused her injuries. *Prorok v. County of Custer*, 221 Neb. 789, 381 N.W.2d 106 (1986).

The judgment of the district court being correct, it is hereby affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DALE BOWERSMITH, APPELLANT.

395 N.W.2d 527

Filed October 31, 1986. No. 85-836.

1. **Miranda Rights: Confessions: Words and Phrases.** Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."
2. **Constitutional Law: Search and Seizure.** Determinations as to whether a person has been seized, in the constitutional sense, are questions of fact.
3. **Motions to Suppress: Appeal and Error.** This court will not overturn the trial court's factual findings when determining the correctness of the trial court's rulings on the suppression of evidence unless those findings are clearly wrong.
4. **Confessions: Evidence.** To be admissible as evidence in his trial, an accused's statements must have been voluntarily made and must not have been the product of any inducement, no matter how slight.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

Douglas Veith of Pelton, Bertolini, Schroeder, Veith and O'Neal, for appellant.

Robert M. Spire, Attorney General, and Bernard L. Packett, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

Defendant, Dale Bowersmith, was convicted, after jury trial, on three counts of sexual assault of a child, in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 1985). He was sentenced to imprisonment of 2 to 3 years on each count, with the sentences to be served concurrently. Defendant appeals, assigning error in the trial court's failure to sustain defendant's motion to suppress statements of Daniel Scott, an investigator for the Nebraska State Patrol. Defendant alleges the testimony of investigator Scott concerned statements made by the defendant during custodial interrogation in which proper rights advisements and *Miranda* warnings were not given and that the statements were elicited as a result of improper influence. For the reasons hereinafter stated we affirm.

The record shows the following. On September 16, 1984, Daniel Scott, an investigator for the Nebraska State Patrol, was requested by the Nebraska City police chief to investigate the sexual molestations of two minor children. Scott was informed during his interview of the complainants (the mothers of the children involved) that defendant was the individual who molested the children. At the hearing on the motion to suppress, investigator Scott testified that, while he had made no judgment as to the guilt of the defendant, he knew he would have to speak with him concerning the allegations.

Scott, in plain clothes, drove in an unmarked car to defendant's home. Upon arriving there Scott was greeted by defendant's wife. Scott identified himself as a police officer and asked to speak with the defendant. Scott waited at the door until the defendant joined him. Since it was cold outside, the

two men decided to talk in Scott's car. The defendant voluntarily joined Scott in Scott's unmarked police car, which was in front of the Bowersmith residence. The car was moved to the side of the residence, where the two men spoke for approximately 5 minutes. The defendant was advised of the allegations made against him. At this point the defendant indicated a desire to talk elsewhere, so he was driven to another location. The defendant and Scott remained at this location for approximately 35 minutes before defendant was driven home.

Scott testified that during their conversation he advised the defendant of the allegations. Furthermore, the defendant was advised that he did not have to talk to Scott, that he was not in custody, that Scott was not there to arrest him, that he had a right to call his attorney, and that he could quit talking at any time and Scott would drive him home.

The defendant testified that he did not feel that he could get out and leave anytime he wanted. Furthermore, he testified Scott asked him to admit to the allegations.

The following day, an officer of the Nebraska City Police Department arrested the defendant and brought him to the courthouse. Investigator Scott then told the defendant he wanted to speak with him concerning the allegations. Scott then fully advised the defendant of his *Miranda* rights. Defendant would not waive these rights, nor would he give a statement.

The defendant argues that investigator Scott's interview in the car on September 16, 1984, was a custodial interrogation. Furthermore, defendant argues the scope of questioning was accusatory rather than investigatory. The U.S. Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), forbids the prosecution from introducing defendant's statements stemming from "custodial interrogation" unless the proper rights advisement has been given. The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or *otherwise deprived of his freedom of action in any significant way*." (Emphasis supplied.) 384 U.S. at 444. This court in *State v. Saylor*, 223 Neb. 694, 699, 392 N.W.2d 789, 793 (1986), citing *California v. Beheler*, 463 U.S. 1121, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983), stated

the ultimate inquiry regarding the custodial status of a suspect " 'is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' " The pertinent question for purposes of this appeal is whether the district court erred in holding that at the time of the interview on September 16, 1984, the matter was still in the investigatory stages and that the defendant was not deprived of his freedom in any significant way. Determinations as to whether a person has been seized, in the constitutional sense, are questions of fact. *State v. LaChappell*, 222 Neb. 112, 382 N.W.2d 343 (1986). While there was testimony to the contrary, we hold the evidence was sufficient for the trial court to find the interview was not custodial in nature and the defendant was not deprived of his freedom in any significant way. Investigator Scott testified he advised the defendant that he did not have to talk. It was the defendant's wish to drive to another location to continue the conversation. Scott testified that he told the defendant he would drive him home whenever defendant desired.

The defendant also argues his statements were solicited through improper coercion or inducement. This court has held that to be admissible as evidence in his trial, an accused's statements must have been voluntarily made and must not have been the product of any inducement, no matter how slight. *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986).

The defendant relies on the holding in *State v. Erks*, 214 Neb. 302, 333 N.W.2d 776 (1983), a single-judge opinion. In *Erks*, Judge Boslaugh affirmed the district court's sustaining of Erks' motion to suppress certain statements made in response to an offer by the interrogator to provide help for the defendant and avoid unnecessary embarrassment for the family. It was held in *Erks* that such offers of help constituted sufficient evidence to support the trial court's finding that statements made after the inducement were not voluntary.

The defendant in the case at bar alleges investigator Scott solicited a confession by discussing the effects the allegations of sexual assault would have on the defendant's wife. The evidence in the case at bar, however, shows that Scott did not offer any inducements to defendant with regard to defendant's wife. Instead, defendant testified as follows: "Q- [Defendant's

counsel] Did he [investigator Scott] talk to you about your wife and what effect this would have on your wife? A- I did." Investigator Scott testified, on this issue of coercion or inducement, that after defendant expressed concern about his wife, Scott told defendant "that if something like this was happening, that if his wife truly cared about him, that she'd understand and they'd work it out." Such statements fall far short of the inducement offered in *State v. Erks, supra*, and clearly constituted sufficient evidence on which the court could determine that no inducement had been offered defendant, and to support the trial court's finding that defendant's statements were voluntary and admissible. In considering such evidence we are bound by the rule that this court will not overturn the trial court's factual findings when determining the correctness of the trial court's rulings on the suppression of evidence unless those findings are clearly wrong. *State v. LaChappell, supra*. The trial court's findings are not clearly wrong and, indeed, are fully supported by the evidence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRANKIE L. COLE, APPELLANT.
395 N.W.2d 532

Filed October 31, 1986. No. 85-934.

1. **Postconviction: Proof: Convictions: Appeal and Error.** Defendant in a postconviction case bears the burden of establishing a basis for relief, and a conviction will not be set aside in the absence of a showing that an error created actual prejudice rather than merely the possibility of prejudice.
2. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal.
3. _____: _____. Issues which were known to defendant and counsel at the time of trial and were capable of being raised in a direct appeal, but were not raised in defendant's direct appeal, are not proper grounds for postconviction relief.
4. _____: _____. It is within the discretion of the district court to determine whether counsel shall be appointed in a postconviction proceeding to represent defendant on appeal to this court, and in the absence of a showing of abuse of discretion, the failure to appoint counsel is not error.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Frankie L. Cole, pro se.

Robert M. Spire, Attorney General, and Dale D. Brodkey, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

This is an appeal filed pro se from a dismissal of a postconviction motion to vacate sentence filed by defendant, Frankie L. Cole.

On March 10, 1983, defendant was convicted by jury in the district court for Douglas County of one count of burglary of a service station, in violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1985), and one count of theft by unlawful taking of an automobile from a repair shop, in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1985). Defendant was sentenced to a term of 10 years' imprisonment in the Nebraska Penal and Correctional Complex on each of the two counts, to be served consecutively. Defendant appealed to this court. The defendant filed a pro se brief in addition to a brief filed by counsel from the Douglas County public defender's office. Defendant's pro se brief raised a number of issues in his assignments of error which were not included in counsel's brief. Defendant argued that his appointed trial counsel and counsel on appeal were inadequate and incompetent. Defendant's convictions were affirmed by this court in *State v. Cole*, 218 Neb. 1, 352 N.W.2d 154 (1984). In affirming defendant's convictions this court found that the assignments of error in the defendant's pro se brief were without merit.

Defendant filed a postconviction motion to vacate sentence on February 5, 1985. This motion alleged ineffective assistance of both trial counsel and counsel on direct appeal. On November 18, 1985, an evidentiary hearing was held, and the district court found the application for postconviction relief to be without merit on the ground that this court had already heard and decided these issues in the direct appeal. The district

court also dismissed counsel appointed to represent defendant on the motion to vacate sentence. Defendant timely filed an appeal to this court.

In his pro se brief, defendant assigns three errors:

(1) That it was error not to rule on new facts raised in the motion to vacate sentence, which were not raised in the issue of ineffective counsel on direct appeal; in particular, that counsel failed to object to an all-white jury and failed to raise arguments of insufficiency of the evidence to sustain conviction under Neb. Rev. Stat. § 28-511 (Reissue 1985);

(2) That it was error to dismiss defendant's counsel when the defendant still had the right to appeal;

(3) That it was error to dismiss the motion to vacate sentence on the ground that the issue of ineffective assistance of counsel had been raised on direct appeal, when it was improperly raised on direct appeal.

We affirm.

Our review of a judgment denying postconviction relief is governed by the holdings of our earlier cases reviewing such matters. We have held that the defendant in a postconviction case bears the burden of establishing a basis for relief, and a conviction will not be set aside in the absence of a showing that an error created actual prejudice rather than merely the possibility of prejudice. *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986). In *State v. Brown*, 220 Neb. 305, 369 N.W.2d 639 (1985), we held that the findings of the district court will not be disturbed on appeal unless they are clearly wrong.

Regarding the first assignment of error, defendant contends that trial counsel's failure to object to a jury composed of members of the white race when defendant is a black man constitutes a new fact not raised in the direct appeal. Defendant, who filed a pro se brief, had an opportunity to raise this issue on direct appeal, but did not do so. At the evidentiary hearing, defendant testified, "What I did was submitted my—you know, the contentions that I wanted to the Supreme Court . . . ." We have stated that issues which were known to defendant and counsel at the time of trial and were capable of being raised in a direct appeal, but were not raised in

defendant's direct appeal, are not proper grounds for postconviction relief. *State v. Isikoff,* 223 Neb. 679, 392 N.W.2d 783 (1986); *State v. Peery, supra; State v. Hurlburt,* 221 Neb. 364, 377 N.W.2d 108 (1985). In addition, no testimony was presented at the evidentiary hearing showing actual prejudice to defendant. We note that the facts of the underlying crimes committed by defendant overwhelmingly pointed to his guilt.

The error assigned that counsel failed to raise arguments of insufficiency of the evidence to sustain conviction under § 28-511 paraphrases errors raised in defendant's direct appeal. A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal. *State v. Isikoff, supra; State v. Hurlburt, supra.* Nor will a defendant be permitted to rephrase issues already presented in order to obtain a further consideration of them. *State v. Peery, supra.* Accordingly, defendant's first assignment of error will not be considered.

Secondly, defendant claims that it was error for the district court to dismiss defendant's appointed counsel at the hearing on the motion to vacate his sentence when defendant still had the right to appeal. It is within the discretion of the district court to determine whether counsel shall be appointed in a postconviction proceeding to represent defendant on appeal to this court, and in the absence of a showing of abuse of discretion, the failure to appoint counsel is not error. *State v. Isikoff, supra; State v. Paulson*, 211 Neb. 711, 320 N.W.2d 115 (1982). The trial court did not abuse its discretion by refusing to appoint appellate counsel on this postconviction appeal.

Lastly, defendant claims that the issue of ineffective counsel was improperly raised on direct appeal, and thus should not prevent review of that issue in the postconviction proceeding. Defendant's argument, although difficult to comprehend, seems to contend that a claim of ineffective counsel is civil in nature and should not have been adjudicated in the direct criminal appeal. In that direct appeal, defendant sought to have his criminal convictions reversed on the basis that he had ineffective counsel. He now contends that this court should not have considered that point. His argument on this issue is totally without merit.

The district court has committed no error in dismissing defendant's motion for postconviction relief. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RYAN T. ROBB, APPELLANT.
395 N.W.2d 534

Filed October 31, 1986. No. 85-995.

1. **Rules of Evidence: Other Acts.** Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character.
2. **Intent: Words and Phrases.** Intent is the state of mind operative at the time of an action.
3. **Criminal Law: Intent.** Intent may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his or her conduct.
4. **Intent: Presumptions.** The law presumes that one of sound mind intends the obvious and probable consequences of his or her voluntary acts.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded for a new trial.

William G. Line of Kerrigan, Line & Martin, for appellant.

Robert M. Spire, Attorney General, and Linda L. Willard, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

Defendant, Ryan T. Robb, was convicted of two counts of theft by the unlawful taking on each occasion of property having a value in excess of $1,000, all in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1985). His assignments of error claim (1) that the trial court abused its discretion by admitting evidence concerning an earlier theft by Robb and (2) that the evidence is insufficient to support the convictions. We reverse and remand for a new trial.

Robb was employed as the manager of the Fremont Village Inn Pancake House, a restaurant, from July of 1984 to February 12, 1985. The restaurant's daily receipts were recorded by cash registers and reported to Vicorp Restaurants, Incorporated, its corporate owner, by weekly sales reports prepared by other employees and approved by Robb. Deposit slips for the receipts were prepared in duplicate twice daily by other employees and a copy of the deposit slips forwarded to the restaurant's owner. Pending deposit, the receipts were kept in a safe, to which a number of persons had access. Only Robb, however, deposited the receipts in the restaurant's account at a Fremont bank.

The owner, as the result of information provided to it by a restaurant employee, caused an audit to be made of the restaurant's financial activities. The audit revealed that the restaurant's receipts, $2,805.46 for February 9, 1985, and $2,374.65 for February 10, 1985, for which deposit slips had been prepared, were not deposited in the restaurant's bank account. When confronted with that fact by the owner's auditor on February 12, 1985, a Tuesday, Robb stated, "The bank must be wrong, because I made last weekend's deposit on Monday." Robb, however, rejected the auditor's request that they go to the bank and see if they could "get this straightened out," left the restaurant's keys with the auditor, and departed from the premises, never to return.

One of the State's witnesses in chief testified that he had employed Robb as the manager of a fast-food restaurant in Omaha from approximately June through October of 1982. Upon confrontation, Robb admitted that during that employment he had stolen "something over" $2,000 and ultimately made restitution for $3,300. After establishing through cross-examination that the money had not been taken through the failure to deposit receipts, for which deposit slips had been prepared by others, Robb moved to strike this witness' testimony and instruct the jury to disregard the testimony. The trial court overruled those motions.

Robb maintains that Neb. Rev. Stat. § 27-404(2) (Reissue 1985) prohibits the introduction of the foregoing evidence and that the trial court abused its discretion by overruling his

motions. Section 27-404(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

We have held § 27-404(2) to be an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character. Thus, § 27-404(2) permits evidence of other acts if such acts are relevant for any purpose other than to show defendant's propensity or disposition to commit the crime charged. *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985); *State v. Stewart*, 219 Neb. 347, 363 N.W.2d 368 (1985); *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

In making its rulings the trial court indicated the evidence of Robb's earlier theft was admissible because it bore on his intent to commit the crime for which he was being tried.

Intent is the state of mind operative at the time of an action. *State v. Stewart, supra.* It may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his or her conduct. *State v. Ewing*, 221 Neb. 462, 378 N.W.2d 158 (1985). See, also, *State v. Beard*, 221 Neb. 891, 381 N.W.2d 170 (1986). Moreover, the law presumes that one of sound mind intends the obvious and probable consequences of his or her voluntary acts. *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984).

There was no defense raised or evidence presented in this case which attempted to establish that if defendant took the February 9 and 10 receipts, his intent could not be inferred from that fact. That being so, the evidence of his prior theft cannot be said to have been introduced to show his intent to commit the thefts which are the subject of this case. In truth and fact, the evidence of his prior theft bore not on Robb's intent at the time of the thefts in question but, rather, on his propensity or disposition to commit those crimes. The evidence of his prior theft was therefore evidence of his character. As such, the trial

court abused its discretion in overruling Robb's motions to strike that evidence and to admonish the jury to disregard it. Given the nature of the evidence concerning whether Robb took the receipts in question, it cannot be said the error in overruling his motions was harmless beyond a reasonable doubt.

Having come to that conclusion, we need not consider whether there were or were not sufficient similarities between the prior theft and the subject crimes as to make the evidence relevant, or whether, even if relevant, the nature of the evidence was such as to require its exclusion under the provisions of Neb. Rev. Stat. § 27-403 (Reissue 1985) as presenting a danger of unfair prejudice to the defendant which substantially outweighed its probative value. Neither do we need concern ourselves with Robb's second assignment of error.

The judgments and sentences of the district court are each reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., dissenting in part.

I dissent from that part of the opinion which holds that the evidence concerning the defendant's prior offense was not admissible.

The opinion states that evidence of the prior theft cannot be said to have been introduced to show the defendant's intent at the time of the recent theft because intent is inferred from the words and acts of the defendant and the facts and circumstances surrounding his conduct. On that theory, evidence of prior acts could never be admissible as proof of intent. The rule is to the contrary.

The general rule is that evidence of similar offenses is admissible where an element of the crime charged is motive, a particular criminal intent, or guilty knowledge. *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975). The rule was codified when Neb. Rev. Stat. § 27-404(2) (Reissue 1985) was adopted.

It is clear that intent is a material element of theft by unlawful taking or disposition. Neb. Rev. Stat. § 28-511(1) (Reissue 1985).

In *State v. Stewart*, 219 Neb. 347, 351, 363 N.W.2d 368, 371

(1985), we stated:

> We have previously dispelled the erroneous notion that Rule 404(2) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-404(2) (Reissue 1979)) contains pigeonholes for admission of evidence pertaining to "other acts." Rule 404(2) of the Nebraska Evidence Rules is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character. Thus, Rule 404(2) permits evidence of other acts if such acts are relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged. *State v. Craig, ante* p. 70, 361 N.W.2d 206 (1985).

In *State v. Hitt*, 207 Neb. 746, 749, 301 N.W.2d 96, 99 (1981), we stated:

> It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.

The rationale for the rule that evidence of other acts is admissible as proof of intent is stated in 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 404[12] at 404-84, 404-87 (1986), as follows:

> Criminal intent has been defined "as that state of mind which negatives accident, inadvertence or casualty." Consequently, evidence of another crime which tends to undermine defendant's innocent explanation for his act will be admitted; "the oftener a like act has been done, the less probable it is that it could have been done innocently." Repetition affords an "opportunity for reflection and for foresight of the consequences," so that even if defendant did not possess the requisite intent initially, it may be inferred that after being involved in a number of incidents, he must have arrived at a mental state inconsistent with innocence by the time of the charged act.

In 2 J. Wigmore, Evidence in Trials at Common Law § 302 at 241 (J. Chadbourn rev. 1979), the theory of the rule is stated as

follows:

> In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent.

As the majority opinion indicates, the defendant in this case, when confronted about the missing deposits, claimed that "[t]he bank must be wrong, because I made last weekend's deposit on Monday." In my opinion, evidence of the defendant's prior offense was admissible as proof of motive, intent, plan, and absence of mistake or accident.

HASTINGS, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. NOEL J. HEATHMAN, APPELLANT.

395 N.W.2d 538

Filed October 31, 1986. No. 86-047.

1. **Criminal Law: Venue: Juries.** To secure a change of venue the defendant must show that pretrial publicity has made it impossible to secure a fair and impartial jury.
2. **Criminal Law: Escape: Sentences.** Nebraska's escape statute, Neb. Rev. Stat. § 28-912 (Reissue 1985), defines one offense and sets out factors which, if present, change the range of the penalty.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal from the district court for Lancaster County in which the appellant, Noel J. Heathman, was charged with one count of escape. Appellant was found guilty and sentenced to the Department of Correctional Services for a period of 18 months.

Appellant's assignments of error may be summarized as follows: (1) The trial court erred in overruling the appellant's motions for change of venue due to pretrial publicity; (2) The court erred in requiring the appellant to remain in leg irons during trial; (3) The court erred in overruling the appellant's motion for mistrial due to prosecutorial misconduct during opening statements; and (4) The court erred in failing to instruct the jury that the elements of the offense of escape are escape from official detention after conviction for the commission of an offense.

The facts are as follows. During a preliminary hearing, counsel for the appellant moved for a change of venue on the basis of the pretrial publicity Heathman's escape had received. Newspaper clippings of the escape were offered and received into evidence. The motion was denied on the basis that there had been an insufficient showing of prejudice to justify a change of venue. There had been no survey of potential jurors, nor, in the eyes of the court, was any more publicity given the Heathman escape than that given other alleged criminal activities.

During the voir dire examination, the motion was renewed. The trial judge permitted the appellant's counsel to voir dire potential jurors in groups of six. While several of the potential jurors remembered hearing or reading something about the

appellant's escape, each person stated that he or she could be a fair and impartial juror. The motion for change of venue was again renewed, and counsel for the appellant refused to pass the panel for cause. The court held that no juror had been shown to have formed or expressed an opinion as to the guilt of Heathman, and although some members of the panel stated that they had knowledge of the incident, their knowledge was vague and indefinite. More importantly, each juror pledged to render a fair and impartial verdict. The trial court again overruled the motion for change of venue.

Appellant next objected to the court's order requiring the appellant to wear leg irons when in the presence of the jury. In response, the court stated:

> I think considering the nature of the charge and his expressed intentions, I don't know what other alternative there is to really provide for security. Do you have any suggestions? We have one, two, three, four doors into the courtroom. I suppose we're talking about, if we were to make sure he could not bolt and get away, I suppose we're talking about a minimum almost of six individuals as guards. I suppose the alternative is he's got the leg irons on.
>
> The other alternative is the courtroom looks like an armed camp. I don't know. Do you have any suggestions?
>
> MR. KEEFE: Well, I don't know that the courtroom has to look like an armed camp.
>
> THE COURT: Do you want to chain him to the window or something? I don't know.

The court permitted the arm shackles to be removed but required Heathman to remain in leg irons.

Next, appellant moved for mistrial during opening statements as a result of comments made by the prosecutor in his opening remarks. The State made reference to the fact that at the time of his escape Heathman was incarcerated after a conviction for kidnaping. After some discussion with regard to the relevance of counsel's remarks, the court denied the appellant's motion for mistrial and, at the request of the prosecutor, admonished the jury that the reference to Heathman's prior offense was irrelevant and should be totally

disregarded.

Finally, counsel for the appellant contends that the trial court erred in failing to instruct the jury that the elements of the offense of escape include official detention after conviction for the commission of an offense. The jury was instructed: "On or about the 9th day of September, 1984 in Lancaster County, Nebraska, the defendant, Noel Heathman, did unlawfully remove himself from official detention." Counsel for the appellant argued that the language "following conviction for the commission of an offense" must be included in the instruction as an essential element of the crime of escape under Neb. Rev. Stat. § 28-912 (Reissue 1985). The trial court held that under *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981), the language at issue would go only to the penalty phase of the proceedings and, therefore, should not be included in the instruction on the essential elements of the crime of escape. We affirm.

Addressing appellant's first assignment of error, appellant contends that he was denied a fair and impartial jury due to the extensive pretrial publicity his escape received. We have often repeated, most recently in *State v. Irish*, 223 Neb. 578, 391 N.W.2d 137 (1986), that a motion for change of venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. Looking to the record of the voir dire, we find no abuse of discretion.

In *State v. Ell*, 196 Neb. 800, 246 N.W.2d 594 (1976), we set out an analysis of the factors to be taken into account in the consideration of a motion for change of venue. They include: (1) the nature of the publicity; (2) the degree to which the publicity has circulated throughout the community; (3) the degree to which publicity has circulated to areas to which venue could be changed; (4) the length of time between the dissemination of the publicity and the date of the trial; (5) the care exercised and the ease encountered in the selection of the jury; (6) the severity of the charge; and (7) the size of the area from which venire is drawn.

Applying the *Ell* analysis to the facts of the case at hand, we note that the publicity centered around the method of the escape and the effects of the escape upon the prison, not

primarily upon Heathman himself. The defense counsel examined the potential jurors in groups of six with respect to the issue of pretrial publicity. Of the 24 persons on the panel, only 12 recalled hearing something about the case, and their knowledge was vague and indefinite. None could remember specific details. See *State v. Kirby*, 185 Neb. 240, 175 N.W.2d 87 (1970). Each member of the panel was able to commit himself or herself to rendering a fair and impartial verdict. None had formed or expressed any opinion as to the defendant's guilt.

To secure a change of venue the defendant must show that pretrial publicity has made it impossible to secure a fair and impartial jury. *State v. Fallis*, 205 Neb. 465, 288 N.W.2d 281 (1980); *State v. Rife*, 215 Neb. 132, 337 N.W.2d 724 (1983). It is not required that the jurors be completely ignorant of the facts of the case. It is sufficient that the jurors are able to lay aside their impressions or opinions and render a verdict based solely upon the evidence adduced at trial. *State v. Navarrete*, 221 Neb. 171, 376 N.W.2d 8 (1985); *State v. Torrence*, 192 Neb. 213, 219 N.W.2d 772 (1974), *cert. denied* 420 U.S. 928, 95 S. Ct. 1127, 43 L. Ed. 2d 399 (1975). We find no merit in this assignment of error.

The appellant's second assignment of error centers upon the trial court's requirement that Heathman remain in leg irons while in the presence of the jury. An examination of the record makes clear that the trial court chose the least restrictive means available. In *State v. Weikle*, 223 Neb. 81, 388 N.W.2d 110 (1986), we faced circumstances very similar to the case at hand. In *Weikle* there were inmate witnesses in the courtroom to testify, and the appellant there also had expressed an intent to escape. There, we held the action of the trial court to be both reasonable and prudent to ensure the safety of all involved.

In *South v. State*, 111 Neb. 383, 196 N.W. 684 (1923), this court held that a defendant should be free from shackles during a criminal prosecution *unless they are necessary to prevent violence or escape.* As we noted in *Weikle*, not every practice that tends to single out the accused must be struck down. *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). In light of this case law and in view of the court's consideration on the record of the available alternative,

Heathman's expressed intent to escape again, and his criminal history, we can find no error in the court's decision to require Heathman to remain shackled during the course of the trial.

The appellant argues that the trial court placed the burden upon him to demonstrate why he should not be shackled, instead of placing the burden upon the State to demonstrate why he should be shackled. We disagree. In the dialogue with defense counsel, the court recited the considerations it felt required the shackling and invited defense counsel to refute those considerations. No burden was unfairly placed on the appellant. The action of the district court was correct.

Focusing upon appellant's third assignment of error, the trial court's refusal to grant a mistrial on the ground of prosecutorial misconduct, again we find no error in the court's action. Exactly what was said by the prosecutor is not known, as the opening statement was not reported. All seem to agree that the remark addressed itself to the status of appellant and the crime for which he was incarcerated. As was noted above, the proper curative measures were taken by the trial court. The two cases cited by the appellant in his brief differ critically from the case at hand. In *Stennett v. State*, 340 So. 2d 67 (Ala. 1976), no curative measures were taken by the trial court after the jury was told by the State in opening remarks that it was about to hear a case about the defendant's selling marijuana. In *State v. Boss,* 195 Neb. 467, 238 N.W.2d 639 (1976), the prosecutor made reference to the defendant's prior conviction. There was no motion for mistrial, objection, or request for a cautionary instruction.

At trial, evidence was introduced to show that Heathman was incarcerated, that he escaped, and that he was subsequently returned to the penitentiary by an officer of the Department of Correctional Services, after apprehension in California. Evidence was adduced to show that the appellant had been committed and was an inmate, after commitment to the Department of Correctional Services, on the date of the escape. Evidence established that Heathman had no permission to be absent from the penitentiary on that date. A witness testified to observing two persons climbing along the outside wall on the date of the escape. Testimony also established that appellant

was not in his cell during a count of the inmates on that date and was absent until being returned on December 19, 1984.

In light of the overwhelming evidence adduced at trial with reference to the facts of the escape, we cannot say that Heathman was in any way prejudiced by the prosecutor's remarks. *State v. Gregory*, 220 Neb. 778, 371 N.W.2d 754 (1985). A motion for mistrial will be addressed to the sound discretion of the trial court. Absent an abuse of that discretion, the trial court's ruling will not be disturbed on appeal. *State v. Ammons*, 208 Neb. 812, 305 N.W.2d 812 (1981). Appellant has not met his burden of showing that he was prejudiced by this alleged error. *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984).

Appellant's final assignment of error involves the court's instruction with regard to the elements of the crime of escape. Appellant argues that the instruction that he escaped from official detention should have been an escape from official detention after the conviction for the commission of an offense. This assignment of error centers around the case of *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981). The appellants there contended that the government did not allege the proper elements of the crime of kidnaping to justify the convictions. Specifically, the informations were defective in that they did not allege that the victim was liberated alive. There, we rejected the appellants' argument that Neb. Rev. Stat. § 28-313 (Reissue 1985) set out two different offenses, one in which the victim was liberated alive and one in which the victim was not. Focusing upon the statute which governs the crime of kidnaping, we noted that subsection (1) defines the offense; subsection (2) sets out the basic penalty; and subsection (3) sets out a mitigating factor, the liberation of a live victim, which, if applicable, permits the sentencing court to impose a lesser sentence. Appellant contends that our interpretation of the kidnaping statute in *Schneckloth* was erroneous and the same reasoning cannot be used in the case at hand. We disagree. As this court stated in *Schneckloth*, the view that the kidnaping statute defines only one offense is the better reasoned approach and the view which is supported by the case law. We adhere to that interpretation.

We find no support for the appellant's contention that the escape statute defined two separate offenses: one in which the defendant escaped from official detention and one in which the defendant escaped from official detention after conviction for the commission of an offense. Section 28-912 reads:

> (1) A person commits escape if he unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period. Official detention shall mean arrest, detention in or transportation to any facility for custody of persons under charge or conviction of crime or contempt or for persons alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes; but official detention does not include supervision of probation or parole or constraint incidental to release on bail.
>
> (2) A public servant concerned in detention commits an offense if he knowingly permits an escape. Any person who knowingly causes or facilitates an escape commits a Class IV felony.
>
> (3) Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority shall not be a defense to prosecution under this section if the escape is from a prison or other custodial facility or from detention pursuant to commitment by official proceedings. In the case of other detentions, irregularity or lack of jurisdiction shall be a defense only if:
>
> (a) The escape involved no substantial risk of harm to the person or property of anyone other than the detainee; and
>
> (b) The detaining authority did not act in good faith under color of law.
>
> (4) Except as provided in subsection (5) of this section, escape is a Class IV felony.
>
> (5) Escape is a Class III felony where:
>
> (a) The detainee was under arrest for or detained on a felony charge or following conviction for the commission of an offense; or

(b) The actor employs force, threat, deadly weapon, or other dangerous instrumentality to effect the escape; or

(c) A public servant concerned in detention of persons convicted of crime purposely facilitates or permits an escape from a detention facility or from transportation thereto.

In our opinion the escape statute defines one offense and, as does the kidnaping statute, sets out factors which, if present, simply change the range of the penalty. The escape statute is structurally similar to the kidnaping statute, and prior interpretations of § 28-912 support this conclusion. E.g., *State v. Schlothauer*, 206 Neb. 670, 294 N.W.2d 382 (1980); *State v. White*, 209 Neb. 218, 306 N.W.2d 906 (1981); *State v. Coffman*, 213 Neb. 560, 330 N.W.2d 727 (1983).

In summary, appellant has not shown that any of the above claimed errors are meritorious. The judgment and sentence are affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring in the result.

I concur in the result reached by the majority in this case. I write separately, however, because I do not wish it to be understood that I agree that as a general rule one charged with escape should be shackled during the trial. For reasons more fully set out in my dissent in *State v. Weikle*, 223 Neb. 81, 388 N.W.2d 110 (1986), I do not believe that one charged with escape should be shackled absent evidence that the defendant intends to try to escape from court and there is no other reasonable method of restraining him.

In the instant case Heathman was found outside the walls of the prison. Unlike the facts in *State v. Weikle, supra*, the evidence in this case was so overwhelming that shackling Heathman could not prejudice his case. Where, however, the evidence is not clear that an escape has occurred, as was the case in *State v. Weikle, supra*, shackling the defendant simply sends a message to the jury which, in my view, is prejudicial to the defendant's rights. Because Heathman was not prejudiced by the shackling, I concur in the majority's conclusion that the judgment and sentence should be affirmed.

STATE OF NEBRASKA, APPELLEE, V. LARRY PRIBIL, APPELLANT.

395 N.W.2d 543

Filed October 31, 1986. No. 86-113.

1. **Directed Verdict.** A motion to dismiss a criminal complaint at the close of the State's evidence can only be granted if there was a total failure of competent proof to support the existence of a material element of the alleged crime or if the testimony adduced was of so weak or doubtful a character that a conviction based thereon could not be sustained.
2. **Lesser-Included Offenses.** To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
3. _____. When some of the elements of the crime charged in the information, without the addition of any element irrelevant to the original crime charged, *may* constitute another crime or crimes, such other crime or crimes are included within the crime charged.
4. _____. Where the lesser offense may be committed in two or more independent ways, one type may be a lesser-included offense even though the remaining type or types are not.
5. **Indictments and Informations: Lesser-Included Offenses.** The nature of the crime charged in the information must be such as to give the defendant notice that he or she could at the same time face the lesser-included offense charge.
6. **Lesser-Included Offenses: Jury Instructions.** Even though a lesser-included offense charge is wrongfully included in the court's instructions to the jury, where the defendant is found guilty of the greater crime, he or she has not been prejudiced by the erroneous instruction.
7. **Lesser-Included Offenses: Jury Instructions: Appeal and Error.** In a prosecution for a felony, error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged unless requested to do so.
8. **Jury Instructions.** It is the duty of a trial court to instruct as to the law applicable to the case. Neither the defense nor the prosecution has the option of precluding the court from carrying out this duty in hopes of forcing an "all or nothing" verdict.
9. **Lesser-Included Offenses: Jury Instructions: Case Disapproved.** The trial court may instruct on a lesser-included offense over the objection of the defendant if the information or complaint charging the crime is such as to give the defendant notice that he or she could at the same time face the lesser-included offense charge. To the extent that *McConnell v. State*, 77 Neb. 773, 110 N.W. 666 (1906), contains language to the contrary, such language is expressly disapproved.
10. **Lesser-Included Offenses: Jury Instructions: Appeal and Error.** Either the State or the defendant may request a lesser-included offense instruction where it is supported by the pleadings and the evidence. However, absent such a request, it is not error for the trial court to fail to give such instruction even though warranted.

Appeal from the District Court for Holt County: EDWARD E. HANNON, Judge. Affirmed.

L.W. Kelly, Jr., of Kelly & Kelly, for appellant.

Robert M. Spire, Attorney General, and William L. Howland, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

The defendant, Larry Pribil, appeals a jury trial verdict in the district court for Holt County wherein he was found guilty of attempt to commit assault in the first degree. We affirm.

On July 1, 1985, LaVonne Pribil was at a friend's home in O'Neill, Nebraska, until approximately midnight. At that time Ms. Pribil drove out of O'Neill on Highway 281 toward her home. She noticed an automobile was following her. It pulled up beside her and began crowding her, forcing her to stop. She recognized that the other automobile belonged to her ex-husband, Larry Pribil, the defendant. The defendant got out of his car, came over to Ms. Pribil's car, and yanked open her car door. He tried to pull Ms. Pribil from the car, but she grabbed ahold of the steering wheel. He then grabbed ahold of her breast and started squeezing and pinching it. Defendant finally pulled her from her car and began to beat her with his fists in the head and neck area. He also kicked her in the back, legs, and ribs. He suddenly stopped beating her, returned to his car, and left the area.

Defendant was charged with first degree assault. At the close of the State's case in chief, defendant moved the court to dismiss the complaint, arguing that the State had failed to prove the element of serious bodily injury necessary for first degree assault. The motion was overruled.

At the close of all the evidence, a jury instruction conference was held. Apparently on its own motion, the court proposed and subsequently gave instructions Nos. 4 and 5, which submitted first degree, attempted first degree, and third degree assault to the jury. Defense counsel objected to those instructions insofar as they submitted the lesser-included offenses of attempted first degree assault and third degree assault to the jury. Those objections were overruled. The case was submitted to the jury, and a verdict of guilty to attempted

first degree assault was returned. A motion for new trial was filed and overruled.

Defendant raises two issues on appeal: (1) whether there was sufficient evidence of serious bodily injury to instruct the jury on first degree assault; and (2) whether it was proper for the district court to instruct the jury on the lesser-included offenses of attempted first degree assault and third degree assault when the defendant had objected to the giving of those instructions.

At the close of the State's case, defendant's counsel moved the trial court to dismiss the complaint, arguing that the State had offered no evidence to prove the existence of one of the material elements of first degree assault, that being the victim's serious bodily injury. See Neb. Rev. Stat. § 28-308 (Reissue 1985). The court could have granted that motion only if there was a total failure of competent proof to support "serious bodily injury" or if the testimony adduced was of so weak or doubtful a character that a conviction based thereon could not be sustained. See *State v. Rubek*, 220 Neb. 537, 371 N.W.2d 115 (1985).

In Neb. Rev. Stat. § 28-109(20) (Reissue 1985), serious bodily injury is defined as "bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." During the State's case, evidence was presented showing that as a result of the beating by the defendant, the victim suffered extensive tenderness and bruises on her neck and chest; scratch-type injuries and bruises on both breasts; skinned knees, ankles, and left arm; a fractured rib; limited range of motion of her neck; and some kidney trauma as evidenced by blood in her urine. She was hospitalized overnight and was in bed approximately a week, taking pain medication. A month after the beating, Ms. Pribil had to have a tooth extracted because it was split. There was evidence showing that the split tooth could have been caused either by the blow to the side of her head or by biting down on something hard.

Certainly such a beating resulting in those injuries is not a total failure of competent proof on the issue of "serious bodily injury." Contrary to defendant's argument, it is not necessary

that the injury *caused* death, or serious permanent disfigurement or impairment of the function of any part or organ of the body, but only that it *involved a substantial risk* of producing those results. Clearly, from a description of the nature and extent of the injuries inflicted, there was presented to the jury a fact question on that issue. The fact that the jury ultimately determined that the defendant was not guilty of first degree assault is totally irrelevant to the issue of whether there was sufficient evidence to submit the crime of first degree assault to the jury. First degree assault was properly submitted to the jury.

Before we address the second of the defendant's allegations of error, we must first address a threshold issue: that being whether third degree assault is a lesser-included offense of first degree assault. Third degree assault may be committed in a variety of ways. It may be accomplished by intentionally, knowingly, *or* recklessly causing bodily injury to another person, or by threatening another in a menacing manner. Neb. Rev. Stat. § 28-310 (Reissue 1985). To commit first degree assault one must intentionally *or* knowingly cause serious bodily injury to another. § 28-308.

The most recent definition of the term "lesser-included offense" appears in *State v. Murphrey*, 220 Neb. 699, 371 N.W.2d 702 (1985). Therein we said, quoting from *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982): " ' "To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. . . ." ' " 220 Neb. at 702, 371 N.W.2d at 705. If the defendant in the instant case intentionally or knowingly caused serious bodily harm to the victim, he surely had intentionally or knowingly caused bodily harm to the victim so as to be guilty of third degree assault.

The confusion in identifying a lesser-included offense, if any exists, results from the additional explanatory language offered in *Lovelace* and countless cases before it: "In sum the lesser included offense is one all the elements of which are necessarily included in the greater." 212 Neb. at 359, 322 N.W.2d at 675. The argument is made that because third degree assault *may* be established by recklessly causing bodily injury to another, or by

threatening another in a menacing manner, these elements are not necessary to establish first degree assault; therefore, third degree assault is not a lesser-included offense.

Perhaps a more clear statement of that summary is found in *State v. McClarity*, 180 Neb. 246, 249, 142 N.W.2d 152, 154 (1966), in which we said: "When some of the elements of the crime charged in the information, without the addition of any element irrelevant to the original crime charged, *may* constitute another crime or crimes, such other crime or crimes are included within the crime charged." (Emphasis supplied.)

In other words, where, as here, the lesser offense may be simple assault committed in two or more independent ways, one may be a lesser-included offense even though the remaining types are not. *State v. Carmichael*, 405 A.2d 732 (Me. 1979).

However, the problem in this case is that the court, in charging the jury as to the material elements of the lesser-included crime of assault in the third degree, required the jury to find that the defendant intentionally, knowingly, or *recklessly* caused bodily injury to the victim. The definition of third degree assault as given to the jury took that crime out of the category of a lesser-included offense of first degree assault because it would have permitted the jury to find the defendant guilty of third degree assault if it found the defendant had recklessly caused bodily injury, an element not present in first degree assault.

It was error for the trial court to include within its definition of third degree assault bodily injury caused recklessly, because the nature of the charge in the information must be such as to give the defendant notice that he could at the same time face the lesser-included offense charge. *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971). In other words, one who is informed upon and comes prepared to defend against an intentional or knowing act is not necessarily prepared to refute an allegation of reckless conduct. A quick reference to the horrendously complicated definition of the term "recklessly" contained in § 28-109(19) will make that painfully clear.

Nevertheless, erroneous though the instruction may be, we do not find that it constituted prejudicial error. Here, as in *State v. Murphrey*, 220 Neb. 699, 371 N.W.2d 702 (1985), the court

properly instructed the jury on attempt to commit assault in the first degree and then continued with language to the effect that if the jury finds beyond a reasonable doubt that the defendant was guilty of the greater crime, the lesser-included crime of third degree assault should not be considered.

> Since the jury found the defendant guilty of attempted burglary and the instruction told them not to consider the "lesser included offenses hereafter set forth," we find no prejudice in the instruction. We presume the jury followed the court's instruction and did not consider any of the purported lesser-included offenses after the defendant was found guilty of the primary charge against him.

Id. at 702, 371 N.W.2d at 705.

We now turn to the question of whether it is error to instruct the jury on a proper lesser-included offense over the objection of the defendant. Defendant, relying on *McConnell v. State*, 77 Neb. 773, 110 N.W. 666 (1906), argues that it was error for the trial court to have instructed the jury, over his objection, on the lesser-included offenses of third degree assault and attempted first degree assault. In *McConnell* the defendant was tried upon a charge of assault with intent to commit rape. He was found guilty. He argued to this court that the trial court erred in failing to instruct the jury, sua sponte, on the lesser offenses of assault and battery and simple assault. Quoting the third syllabus point from *Barr v. State*, 45 Neb. 458, 63 N.W. 856 (1895), we held: " 'In a prosecution for a felony error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged, unless requested to do so.' " *McConnell, supra* at 775, 110 N.W. at 667. Because McConnell had not requested such an instruction, he could not raise as error the failure of the trial court to instruct on those lesser included-offenses. That is still the law in Nebraska. *State v. Bell*, 194 Neb. 554, 233 N.W.2d 920 (1975).

We then went on to state in *McConnell, supra* at 775, 110 N.W. at 667:

> It may be said for this rule that it is not without reason for its support. It may happen that, where a defendant is charged with a heinous crime, and the evidence against him is slight, he would prefer to have the jury understand

> that he must be found guilty of the particular crime charged, or else not guilty. For in such a case the jury might well refuse to convict of the heinous crime, and yet readily agree to find the defendant guilty of a lesser offense, amounting, perhaps, to no more than a misdemeanor. *By adhering to this rule we offer a defendant an opportunity to exercise his election, and have such an instruction by requesting the court to give it.*

(Emphasis supplied.) Defendant argues that this language supports his contention and is controlling.

Defendant is correct in his assessment that the above language supports his argument, but is not correct in stating that the language is controlling. The holding in *McConnell* is merely that a defendant must request instruction on lesser-included offenses before he can argue on appeal that he should have had such instructions. The rest of the language in *McConnell* is dicta.

Moreover, the language in *McConnell* upon which defendant relies runs counter to the general duty of a trial court to instruct on the law in the case, whether requested to do so or not, *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983), and is expressly disapproved.

The propriety of instructing the jury on lesser-included offenses when the defendant objects to such a request has been raised in Nebraska, but never decided. See *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982). The issue has, however, been decided in Michigan in the case of *People v Chamblis*, 395 Mich. 408, 236 N.W.2d 473 (1975). In that case the defendant was charged with armed robbery. The trial judge, over the defendant's objection, instructed the jury on the lesser offenses of unarmed robbery and larceny from the person. The jury found the defendant guilty of the lesser offense of larceny from the person. The court of appeals reversed the trial court. The Supreme Court of Michigan reversed the court of appeals and reinstated the jury conviction.

The Michigan Supreme Court first addressed the defendant's contention that it was error for the trial court to have instructed the jury on the lesser offenses over the defendant's objection. The court rejected the defendant's contention, stating:

> Defense counsel's objection to the giving of the instruction on lesser included offenses is not controlling. It is the duty of the trial court to instruct the jury as to the law applicable to the case. [Citation omitted.] *Neither the defense nor the prosecution has the option of precluding the court from carrying out this duty in hopes of forcing an "all or nothing" verdict.*

(Emphasis supplied.) *Id.* at 415, 236 N.W.2d at 476. The reason for this rule was best stated by the California Supreme Court in *People v. Wickersham*, 32 Cal. 3d 307, 324, 650 P.2d 311, 319, 185 Cal. Rptr. 436, 444 (1982):

> The fulfillment of this obligation ensures that the jury will consider the full range of possible verdicts—not limited by the strategy, ignorance, or mistakes of the parties. The jury should not be constrained by the fact that the prosecution and defense have chosen to focus on certain theories. "Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. . . ."

Chamblis did not, however, *require* the trial court to instruct sua sponte on lesser-included offenses.

> We do not say here that a trial judge *must* instruct *sua sponte* on a lesser included offense, but simply that he *may* do so if the evidence adduced at trial would warrant conviction of the lesser charge and defendant has been afforded fair notice of those lesser included offenses.

(Emphasis in original.) 395 Mich. at 417, 236 N.W.2d at 477-78. *Chamblis* goes on to explain "fair notice" as follows:

> To assure defendant's due-process rights to fair notice, the trial judge may not instruct on lesser included offenses over defendant's objection unless the language of the charging document "be such as to give the defendant notice that he could at the same time face the lesser included offense charge". *United States v. Whitaker*, 144 US App DC 344, 350; 447 F2d 314, 320 (1971).

395 Mich. at 418, 236 N.W.2d at 478.

Although we have discussed the duty of the trial court to

instruct on the law of the case whether requested to or not, we should point out that no error can be claimed for failure to instruct on a lesser-included offense where that instruction has been expressly waived by the defendant.

Either the State or the defendant may request a lesser-included offense instruction where it is supported by the pleadings and the evidence. However, absent such a request, it is not error for the trial court to fail to give such instruction even though warranted. The rationale for this conclusion is based on the rule that where the general charge as contained in the instructions fairly presents the case to the jury, error cannot be predicated on a failure to instruct on some particular phase of the case unless a proper instruction has been requested by the party complaining. See, *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472 (1978); *State v. Lynch*, 196 Neb. 372, 243 N.W.2d 62 (1976).

We therefore hold that it is not error for a trial court to instruct the jury, over the defendant's objection, on any lesser-included offenses supported by the evidence and the pleadings. This holding is consistent with our decision in *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983), in which we stated that it was not error for a trial court to instruct a jury, over the defendant's objection, on the defense of intoxication.

The judgment of the district court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority opinion in this case. I do so because I do not believe that the provisions of Neb. Rev. Stat. § 28-310(1)(a) (Reissue 1985) can be dissected to the extent that the majority has done. The term "reckless" cannot be removed from the phrase "intentionally, knowingly." Therefore, under our holdings in *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982), and *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984), assault in the third degree is not a lesser-included offense of first degree assault. Specifically, in *State v. Lovelace, supra* at 359, 322 N.W.2d at 675, we defined a lesser-included offense as

> "one which is necessarily established by proof of the greater offense. Fuller v. United States, 407 F.2d 1199. To

> be a lesser included offense, the *elements* of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. Certain v. State, 261 Ind. 101, 300 N.E.2d 345. In sum the lesser included offense is one *all* the elements of which are necessarily included in the greater. See, State v. Jones, 186 Neb. 303, 183 N.W.2d 235; State v. McClarity, 180 Neb. 246, 142 N.W.2d 152." See, also, *State v. White*, 209 Neb. 218, 306 N.W.2d 906 (1981).

(Emphasis supplied.)

The majority recognizes this rule but attempts to get around it by simply providing that the reckless portion of assault in the third degree may be disregarded when attempting to determine if it is a lesser-included offense of assault in the first degree. But our holding in *State v. Lovelace, supra*, required that all the elements of the lesser must be present in determining the greater. So long as reckless is a part of the offense and one of the elements, then the lesser-included offense is not one all the elements of which are necessarily included in the greater.

I am simply unaware of any authority that permits us to disregard a part of the statute as we have in the instant case. Whether one had committed an act knowingly and intelligently or simply recklessly is a question of fact to be determined by a jury and not one which the court in the first instance should direct.

Looking at the problem from the other end perhaps makes the problem even clearer. It has long been the rule in this jurisdiction that if one is charged in the language of the statute, the complaint is sufficient. See, *State v. Lingle*, 209 Neb. 492, 308 N.W.2d 531 (1981); *State v. Lauver*, 26 Neb. 757, 42 N.W. 762 (1889). Therefore, one may be charged with the offense of third degree assault by simply alleging that the defendant did "intentionally, knowingly, or recklessly" cause bodily injury to another. I cannot imagine that if a defendant filed a motion requiring the State to elect whether it intended to prove the defendant had committed the assault knowingly and intentionally, as opposed to recklessly, we would sustain such a motion. And yet, we have, by our majority opinion here today, created what appear to be separate offenses. Moreover, without

authority to do so, we have interpreted the act to reach our goal. This we should not have done. We have long held that a statute which is clear and unambiguous requires no interpretation. In *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 302, 363 N.W.2d 362, 366 (1985), we said: "Generally, a statute is not read as automatically requiring judicial construction. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning." See, also, *Little Blue N.R.D. v. Lower Platte North N.R.D.*, 206 Neb. 535, 294 N.W.2d 598 (1980); *State v. Adkins*, 196 Neb. 76, 241 N.W.2d 655 (1976). There is nothing ambiguous about the statute defining assault in the third degree which requires us to interpret it or to conclude that there are various elements of the statute which can, for some purposes, be disregarded, except, apparently, our desire to make assault in the third degree a lesser-included offense of assault in the first degree—sometimes. The instruction was in error, and requires us to reverse and remand the matter.

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY K. JAMESON, APPELLANT.

395 N.W.2d 744

Filed October 31, 1986. No. 86-149.

1. **Speedy Trial: Time.** The right to a speedy trial does not include the time after the defendant has been found guilty and before he is sentenced.
2. **Criminal Law: Prior Convictions: Indictments and Informations: Drunk Driving.** Just as a wrong date in an information will not preclude a defendant from being sentenced as a habitual criminal if the record discloses the defendant could not have been misled or confused, so, too, a wrong date in a complaint will not preclude a defendant from being sentenced as one who has previously been convicted of driving while under the influence of alcohol if the record discloses that the defendant could not have been misled or confused.

Appeal from the District Court for Kearney County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Gary L. Hogg, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The appellant, Timothy K. Jameson, was charged in the county court for Kearney County, Nebraska, with driving while intoxicated, third or subsequent offense, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984). Pursuant to a plea bargain, Jameson, accompanied by counsel, entered a plea of no contest. The court subsequently found that Jameson had been previously convicted of more than three prior offenses and sentenced Jameson to 3 months in jail, fined him $500, and suspended and revoked his license to drive for the remainder of his life. The decision of the county court was appealed to the district court for Kearney County, where the decision was in all respects affirmed. It is from that decision that Jameson now appeals to this court.

He assigns as error the following: (1) The trial court erred in accepting Jameson's plea before properly arraigning Jameson on an amended complaint. (2) The trial court erred in holding the enhancement hearing more than 6 months from the date of the alleged crime and the date Jameson was arrested. (3) The trial court erred in receiving in evidence previous convictions at the enhancement hearing, when the dates on the convictions did not conform with the dates alleged in the complaint and did not further comply with certification or authentication requirements. (4) The sentence is excessive.

We have carefully reviewed all of the assignments and find none of them to have merit. For that reason the judgment and sentence are affirmed.

The record discloses that on July 9, 1984, a woman driving northbound on Highway 10 out of Minden, Nebraska, encountered a southbound vehicle traveling in the northbound lane. The vehicle crossed back and forth across the centerline, causing the woman to drive onto the shoulder of the road in order to avoid an accident. Shortly thereafter, the woman returned to Minden. As she approached the intersection of

Highway 10 and U.S. Highway 6, she observed the same vehicle stopped in the middle of the road and noticed that the driver appeared to have "passed out." She contacted the Minden police and reported these facts. The chief of police drove to the scene. Upon arriving there he detected a strong odor of alcohol coming from the driver, whom he determined was Jameson. After Jameson was awakened by the chief of police, he swayed and staggered and needed assistance in maintaining his balance. A breath test was later administered and registered .19 percent blood alcohol content. He was therefore charged with driving while intoxicated, third or subsequent offense, and ordered to appear in court on July 16, 1984. On July 13, 1984, a formal long-form complaint, utilizing the language of § 39-669.07, was filed. It listed five previous convictions with dates of May 1, 1982, June 1, 1980, December 18, 1978, March 27, 1976, and July 17, 1974.

On July 16, 1984, the date on which Jameson was to appear in court, he requested and was granted a continuance. Again, on July 31, 1984, he requested a continuance, which was granted. On August 20, 1984, Jameson and his attorney appeared in court for arraignment. Four individuals were arraigned at the same time. The prosecuting attorney read the names of the parties and stated that they were all present. The court then advised all four of the defendants of their constitutional rights. The record reflects that the trial court was meticulous in explaining all of their rights, the charges then pending against them, and the possible pleas which could be made by the various defendants. Jameson specifically stated that he understood the charge and the possible penalties and acknowledged that his attorney was present.

Jameson's counsel then advised the court that Jameson had not received a copy of the formal complaint prior to arraignment, and requested a continuance. The arraignment was continued until September 17, 1984. On September 6, 1984, Jameson filed a written plea of not guilty, demanding a jury trial. Jameson was then ordered to appear on October 2, 1984, for a pretrial conference. However, on September 26, he requested a continuance, and it was granted until October 23. At that time trial was set for December 11. On November 13

Jameson requested a continuance until December 18, which was granted. While the record does not disclose any further continuances, apparently at least one more continuance was granted, because trial was not held until January 8, 1985.

At the time set for trial, Jameson appeared with his attorney. Pursuant to plea negotiations, he agreed to plead to the underlying offense of driving while intoxicated and to have the enhancement proceedings held at a later date. The State agreed to that, and further agreed not to attempt to seek a revocation of probation that Jameson was then serving on two previous sentences. The court proceeded to accept Jameson's plea of no contest to the underlying charge of driving while intoxicated. Before doing so the trial court again advised Jameson of all of his necessary constitutional rights. The court found that the plea was made voluntarily and accepted it. The court began to inform Jameson of the possible penalties but was interrupted by Jameson's counsel because, apparently, the parties had agreed to postpone the sentencing hearing until another time. Specifically, Jameson waived his right to include the time between the date of the trial and the date of the enhancement proceedings for the purpose of computing time pursuant to the Nebraska speedy trial statute.

On March 11, 1985, an enhancement proceeding was held. The State introduced exhibits 1 through 6, which were certified copies of previous county court convictions for driving while intoxicated. Exhibit 1 is the transcript for a proceeding of an offense committed January 14, 1981. A journal entry reflects that on July 27, 1982, Jameson, in the presence of his attorney, entered a plea of no contest to the charge. Exhibit 2 is the transcript for a proceeding of an offense committed May 1, 1982. A journal entry reflects that on July 27, 1982, with counsel present, Jameson also pleaded no contest to this charge. Exhibit 3 is the transcript for a proceeding in connection with an offense committed June 1, 1980. A journal entry reflects that on June 9, 1981, while counsel was present, Jameson pleaded guilty. Exhibit 4 is the transcript for a proceeding on an offense committed March 27, 1976. A journal entry reflects that on July 15, 1976, with counsel present, Jameson pleaded no contest. Exhibit 5 is the transcript for a

proceeding for an offense committed December 18, 1978. A checklist in the court record reflects that on February 28, 1980, with counsel present, Jameson pleaded guilty. Exhibit 6 is the transcript for a proceeding on an offense committed May 5, 1974. There is an affidavit stating that Jameson was unable to procure counsel and a certificate of appointment of counsel dated July 18, 1974. The record further reflects that on August 1, 1974, Jameson entered a plea of guilty.

The record also reflects that before sentence was imposed Jameson was afforded an opportunity to review all of the records. He stated that he had no objection as to authenticity but objected on the following bases: (1) that there was a lack of foundation; (2) that the dates of the convictions were different from those listed in the complaint; (3) that there was no showing for factual basis for the pleas; (4) that the pleas were not knowing, intelligent, and voluntary; and (5) that the checklist in exhibit 5 was hearsay. On March 22, 1985, the county court found Jameson guilty of third offense driving while intoxicated. The matter was then continued to May 14, 1985, at which time a presentence investigation was received by the court. At this time the court imposed sentence.

While this court is mindful of the fact that counsel has a duty to his or her client, and the court encourages counsel to vigorously and fully defend, the court, nevertheless, must observe that the appeal in this case borders on the frivolous. The record is clear, beyond question, that prior to accepting Jameson's plea, the court, in the presence of his counsel, informed Jameson of all of his necessary constitutional rights, including the nature of the charges against him, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination. See *State v. Irish,* 223 Neb. 814, 394 N.W.2d 879 (1986). The record makes it clear that Jameson's plea of no contest was made freely, voluntarily, and knowingly, and any claim to the contrary is wholly unsupported by the record.

Jameson's claim that the court erred in holding the enhancement hearing more than 6 months from the date of the alleged crime has absolutely no merit at all. In the first instance the record discloses that he specifically requested all of the

continuances, including the time for imposing sentence, and specially waived any objection. While one might say that the court was more lenient with Jameson than it should have been, one cannot say that Jameson's right to a speedy trial under either Nebraska law or the U.S. Constitution was violated. Neb. Rev. Stat. § 29-1207(4)(b) (Reissue 1985) clearly provides that in computing the time for trial the period of delay resulting from a continuance granted at the request of the defendant or his counsel is excluded. In this case that amounts to 80 days. On that basis Jameson was required to have been *tried* by March 30, 1985. In fact, he was tried on January 8, 1985. The right to a speedy trial does not include the time after the defendant has been found guilty and before he is sentenced.

The language of § 29-1207 reads as follows: "(1) Every person indicted or informed against for any offense shall be *brought to trial* within six months . . . ." (Emphasis supplied.) There then follow certain exceptions, including "[t]he period of delay resulting from a continuance granted at the request . . . of the defendant . . . ."

Nor does a delay occasioned by the various requests made by the defendant constitute a violation of a defendant's right to a speedy trial under the sixth amendment to the U.S. Constitution. It would be a strange anomaly if a defendant could first ask for a series of continuances and then be immune from prosecution because he had not been granted a speedy trial. Even under the most liberal view of the sixth amendment, that argument will not "hold water." The assignment of error is simply without basis.

Jameson's third assignment of error is, likewise, without merit. He maintains that the previous convictions should not have been received in evidence, principally because the dates set out in the complaint did not correspond with the dates of the previous convictions. Unfortunately, the complaint alleged that *prior convictions* occurred on May 1, 1982, June 1, 1980, December 18, 1978, March 27, 1976, and July 17, 1974. While it is true that the convictions were entered on dates other than those listed in the complaint, the dates listed, other than the July 17, 1974, date, were in fact the dates on which each of the offenses was committed. The July 17, 1974, date was in error.

However, in view of the fact that there were more than two prior convictions without the July 17, 1974, event, it may be disregarded. Jameson was fully advised of the previous convictions the State intended to rely upon in proving that this was at least a third offense. Not only did the State seek to offer into evidence the prior convictions but in each instance introduced what appear to be the entire proceedings, including the complaint, any requests for continuances, and the judgment. In each instance the record reflects that Jameson was represented by counsel when he entered his plea to charges as set out in the complaint.

A reading of § 39-669.07 makes it clear that the substantive offense is driving while under the influence of alcohol or with more than .10 percent of alcohol in one's body fluid. The number of times a person has previously been convicted of such a charge is not itself a crime but, rather, is a factor which the trial court is to consider in imposing sentence. To that extent it is similar to our habitual criminal act, Neb. Rev. Stat. § 29-2221 (Reissue 1985). One is not sentenced for the crime of being a habitual criminal. Instead, the sentence imposed for violating some law of this state is enhanced because the defendant has previously been convicted. *State v. Rolling*, 209 Neb. 243, 307 N.W.2d 123 (1981). The same is true with regard to driving while under the influence of alcohol. See, also, *State v. Helgeson*, 235 Kan. 534, 680 P.2d 910 (1984); *State v. Nelson*, 178 Mont. 280, 583 P.2d 435 (1978); *State v. Carpenter*, 29 Or. App. 879, 565 P.2d 768 (1977).

And just as a wrong date in an information will not preclude a defendant from being sentenced as a habitual criminal if the record discloses the defendant could not have been misled or confused, so, too, a wrong date in a complaint will not preclude a defendant from being sentenced as one who has previously been convicted of driving while under the influence of alcohol if the record discloses that the defendant could not have been misled or confused.

In *State v. Harig*, 192 Neb. 49, 55-57, 218 N.W.2d 884, 889-90 (1974), we said:

> [T]he Habitual Criminal Act does not create a new and separate criminal offense . . . but provides merely that the

> repetition . . . aggravates the guilt and justifies greater punishment . . . . Under this act, the inaccurate allegation of the date or time of a prior felony would have no effect with respect to the sufficiency of the information as to its allegation of the principal or underlying felony or felonies. As to such felonies the time of a prior conviction is only a historical fact. . . .
>
> . . . While it is undoubtedly desirable and helpful to have the dates of the prior felonies alleged in the information charging a defendant with being an habitual criminal, we do not find that the absence of such allegation would necessarily render the information invalid. . . . [I]t is necessary to read the provisions of the Habitual Criminal Act . . . with the provision of section 29-1501 . . . : "No indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings be stayed, arrested or in any manner affected . . . for omitting to state the time at which the offense was committed in any case where time is not the essence of the offense; nor for stating the time imperfectly . . . ." [U]nder Nebraska law, informations are generally subject to the same requirements as are indictments. . . . It is clear that the exact time of the commission of an alleged prior felony is not of the essence of a charge . . . and the failure of the information in this case to state accurately the time of a prior felony does not render that information insufficient . . . .
>
> . . . This is not to say that evidence need not be presented to establish the exact time or date of the prior felony or felonies generally alleged. But we see no constitutional problems in this regard so long as means are and were provided for the defendant to obtain the information relative to the specific dates of the offenses relied upon as prior felonies . . . .

In the instant case the record is clear that Jameson could not have been misled or confused. If anything, he was probably better informed by being told the date the offense was committed rather than the date of the conviction, which was delayed by Jameson's requests for continuances. The claim of

error is without merit.

Jameson's other claims of error in connection with the enhancement hearing are likewise without merit. Clearly, the records were properly authenticated and admissible into evidence without further foundation. Moreover, each record reflected that Jameson was represented by counsel at each proceeding. That is all that the State has the burden of proving before offering the previous records. See, *State v. Hamblin*, 223 Neb. 469, 390 N.W.2d 533 (1986); *State v. Fraser*, 222 Neb. 862, 387 N.W.2d 695 (1986). If in fact other deficiencies existed, the burden was upon Jameson to come forward with the evidence. See § 39-669.07. This he did not do.

And, finally, Jameson argues that the sentence is excessive. The sentence was required by the provisions of § 39-669.07. Subsequently, it is true, the Legislature did amend the statute to provide that

> [a]ny person who prior to April 19, 1986, has had his or her motor vehicle operator's license revoked for life pursuant to section 39-669.07 or 39-669.08 may submit an application to the court for a reduction of such lifetime revocation. The court in its discretion may reduce such revocation to a period of fifteen years.

Neb. Rev. Stat. § 39-669.38 (Cum. Supp. 1986). We believe that the county court which originally sentenced Jameson should be afforded the opportunity to exercise that discretion, and therefore we do not modify the order, subject, however, to Jameson's right to petition the county court for Kearney County, Nebraska, for a reduction in sentence.

In view of the fact that there is no error, the judgment and sentence are affirmed.

AFFIRMED.

BOSLAUGH and WHITE, JJ., concur in the result.

DONNA BELLE ALLEN, APPELLEE, V. JOSEPH BERNARD ALLEN, APPELLANT.
395 N.W.2d 551

Filed October 31, 1986. No. 86-276.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

R. Bradley Dawson, for appellant.

R.W. Satterfield, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an appeal from a property division award incident to a dissolution action. After reviewing the matter de novo to determine whether the trial court abused its discretion, *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984), we find we agree with the disposition made in the division of property ordered by the trial court.

The judgment of the district court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALEX J. BORCHARDT, APPELLANT.
395 N.W.2d 551

Filed October 31, 1986. No. 86-355.

1. **Pleadings: Trial: Evidence: Appeal and Error.** Ordinarily, the overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve error.
2. **Pleadings: Trial: Appeal and Error.** One wishing to preserve error on the basis of remarks contained in an opening statement generally must object to the questioned remarks when made, notwithstanding the overruling of a motion in limine.
3. **Trial: Appeal and Error.** A litigant may rely on a trial judge's announcement of what he or she will permit an opponent to do.

4. **Motions for Mistrial.** The determination of whether to grant a motion for mistrial lies within the sound discretion of the trial court.
5. _____. A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of other incompetent matters are examples of occurrences which may constitute such events.
6. **Motions for Mistrial: Appeal and Error.** Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike improper material is sustained and the jury is admonished to disregard such material.
7. **Attorney and Client.** A lawyer should represent a client zealously within the bounds of the law.
8. **Criminal Law: Prosecuting Attorneys.** The responsibility of a public prosecutor differs from that of the usual advocate; his or her duty is to seek justice, not merely to convict. This special duty exists because (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial, the prosecutor is not only an advocate but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence known to him or her that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.
9. **Attorneys at Law.** In appearing in his or her professional capacity before a tribunal, a lawyer shall not state or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
10. **Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.
11. **Trial: Evidence: Rules of Evidence: Words and Phrases.** Evidence of a test result cannot be characterized as "scientific" or qualify as "technical or other specialized knowledge," and thus within the purview of Neb. Rev. Stat. § 27-702 (Reissue 1985), unless and until it is established that the test result demonstrates what it is claimed to demonstrate.
12. **Convictions: Appeal and Error.** A conviction will not be set aside in the absence of a showing that an error created prejudice.
13. **Trial: Evidence: Appeal and Error.** In resolving a challenge to the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of

explanations, or weigh the evidence. Such is for the trier of fact and must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

14. **Appeal and Error.** It is not for this court to accept one version of a case over another; that is for the jury.
15. **Verdicts: Appeal and Error.** After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if the evidence sustains some rational theory of guilt.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

James R. Mowbray of Mowbray, Chapin & Walker, P.C., for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

A county court jury found defendant, Alex J. Borchardt, guilty of operating or being in actual physical control of a motor vehicle while under the influence of alcoholic liquor in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1985). After an enhancement hearing, during which it was established that defendant had once before been convicted of drunk driving, the county court adjudged him guilty of second offense drunk driving and sentenced him to imprisonment for 30 days, ordered him to pay a $500 fine and costs, and suspended his driver's license for 1 year. The district court affirmed the county court's judgment and sentence. In this court defendant urges the district court erred in failing to find error appearing on the record made in the county court, in that the county court erred in (1) overruling his motion in limine, (2) overruling his motions for a mistrial, (3) admitting testimony concerning the results of the field horizontal nystagmus test, and (4) determining the evidence sufficient to support the jury's finding of guilt. We affirm.

FACTS

On June 11, 1985, at approximately 10:40 p.m., Trooper

Gerald Carlson of the Nebraska State Patrol was proceeding north on 84th Street in Lincoln when he observed a vehicle driven by defendant approaching him in the southbound lane. Carlson detected from the headlights of defendant's vehicle that it was continually crossing over the centerline. At one point defendant's vehicle crossed completely into the northbound lane, forcing Carlson into a ditch to avoid a collision. Carlson then turned his vehicle around, activated his flashing lights, and pursued defendant. Defendant continued to cross over the centerline with the left wheels of his vehicle and once again crossed completely into the northbound lane. Carlson believed that because he had been following defendant with his emergency lights flashing, an approaching vehicle had pulled over to the shoulder, thus avoiding a possible collision with defendant. Defendant eventually pulled over and came to an abrupt stop.

Carlson then pulled his patrol car behind defendant's vehicle and approached defendant. Carlson observed that defendant's eyes were bloodshot, that he emitted a moderate odor of alcohol, and that he sometimes slurred his speech. Carlson informed defendant that he had crossed the centerline several times and had nearly run his patrol car and another vehicle off the road. Defendant replied he did not feel that he had done anything wrong.

Carlson then asked defendant to accompany him to his patrol car in order that sobriety tests could be performed. While walking to the patrol car, defendant staggered and leaned on the hood of the patrol car for support. Once inside the patrol car, defendant was asked to perform several field sobriety tests. Carlson first asked defendant to recite the alphabet from *a* to *z*. Defendant slowly, but correctly, recited the alphabet to the letter *p*, when he stopped and told Carlson that he did not desire to continue. Defendant was then asked to count backward from 100 to 70 by 1s. This test was performed correctly. Defendant was next asked to count forward from 1 to 10, then backward from 10 to 1. Defendant counted from 1 to 10 correctly; however, he became confused when counting backward and mixed the numbers. Finally, Carlson asked defendant to perform a horizontal nystagmus test, the purpose of which was

to check defendant's eyes for unusual twitching or jerking, the presence of which would indicate intoxication. Carlson testified that during this test he observed a definite twitching in defendant's left eye.

Defendant was then asked to perform two further sobriety tests outside the patrol car in order to test his balance. First, defendant was asked to walk, placing one foot in front of the other, heel to toe, on a roadside line. Defendant was not able to walk heel to toe at all times and was unable to stand still without swaying. Defendant was next asked to perform a one-leg stand, raising the opposite foot off the ground 3 to 6 inches. During this test, defendant swayed "badly" and placed the suspended foot on the ground three times. Carlson testified that based on all of the facts before him, he had concluded that defendant was under the influence of alcohol.

Carlson and defendant got back into the patrol car in order for Carlson to give defendant a preliminary breath test. Defendant asked Carlson if he could be let go or allowed to park his car, to which the officer replied in the negative. Defendant then again told Carlson he felt he had not done anything wrong and wanted to speak with someone of higher authority. Carlson contacted Sgt. Kevin Stukenholtz and asked Stukenholtz to meet him at the site of the investigation.

While waiting for Stukenholtz, Carlson performed the preliminary breath test, then informed defendant that he was under arrest for driving while intoxicated. Defendant repeated he felt that he had not done anything wrong and again asked if there were any way to deal with the situation other than by arrest. Carlson replied in the negative.

When Stukenholtz arrived at approximately 11:30 p.m., he was met by Carlson and informed of what had transpired. Stukenholtz then entered the patrol car with the defendant, leaving Carlson outside. Stukenholtz testified that he observed defendant to have bloodshot eyes, a moderate odor of alcohol on his breath, and slurred speech. Defendant asked the officer the reason for his arrest and if there were not some other way the matter could be handled. Stukenholtz replied that the matter would continue according to established procedure. Defendant then asked Stukenholtz if he was "really that bad."

Defendant was then taken to the county-city jail in Lincoln. Defendant was unsteady when he walked from the patrol car to the jail. At the jail defendant was given the *Miranda* warnings and was then questioned by Carlson, with Stukenholtz observing. Stukenholtz testified that when defendant spoke, he began clearly but would ramble toward the end and start running his words together.

In reply to questioning defendant said that he had been at the Ashland Country Club for a social outing and had been drinking from approximately 7 p.m. to 10 p.m. When asked how many drinks he had consumed, he replied, "one drinking." When asked if he was intoxicated or under the influence of alcohol, defendant replied in the negative. Stukenholtz nonetheless formed the opinion that defendant was under the influence of alcohol.

Defendant testified that on the day of his arrest, he had come in from the golf course at Ashland Country Club somewhere between 5:30 and 6:15 p.m. No alcohol was allowed on the course, so defendant had not been drinking prior to this time. Up until approximately 8:30 p.m., he consumed four or five vodka tonics, after which he began to drink coffee.

Defendant admitted crossing the centerline as he was driving home that evening, but attributed the occurrence to the fact that he had been working excessively long days and was "dozing off" rather than under any influence of alcohol. He denied completely crossing the centerline or forcing any other drivers into a ditch.

Defendant also considers his performance on the field sobriety tests to have been adequate. First, defendant believes that Carlson asked him to "recite the alphabet," not "do the alphabet from A to Z." Defendant stopped at the letter *p* because he felt that he had performed adequately. Defendant also does not believe he mixed the numbers while counting backward from 10 to 1. He explains his performance on the balance tests on the grounds that it was dark and the only light provided to walk the line came from the trooper's flashlight. Defendant also testified that any difficulty he had with the one-leg stand was due to the fact that he had severely fractured his right ankle in January 1984 and had a screw placed in the

ankle for healing. Although the screw had been removed, the ankle continued to cause pain and was in fact causing pain at the time of the arrest. Defendant admitted he told Carlson he was not handicapped before performing any tests, as he does not consider himself such.

Defendant also testified that he had attempted to dissuade Carlson from arresting him because he did not believe he was under the influence of alcohol.

Carlson testified that defendant had remained friendly, cooperative, and talkative throughout the evening. The two witnesses called by defendant testified, however, that when defendant was under the influence of alcohol, he was loud, belligerent, and uncooperative. One of these witnesses, a close friend and employee of defendant, testified that he had been with defendant at the outing, and while he knew defendant had been drinking, defendant was not drunk. The other witness, also an employee of defendant, picked defendant up at the police station sometime after midnight, and he testified that he did not observe defendant to have slurred speech or to be staggering. It was this witness' opinion that defendant was not intoxicated.

MOTION IN LIMINE

The first assignment, that the county court erred in overruling defendant's motion in limine, is based on the fact that the Intoxilyzer failed to print on the test card the reading the machine had displayed. Reasoning that such a failure would make it impossible for the State to meet its burden of proving the machine was operating properly, defendant moved for an order directing the prosecutors to refrain from making any direct or indirect reference, during opening statement or at any other stage of the trial, to the Intoxilyzer test or its results. One of the prosecutors, however, assured the court the State would lay a proper foundation for admitting the test results and detailed what she thought that evidence would be. In making its ruling the court noted that at that point it did not know what the State would be able to show in the way of foundation for admission of the test. During the State's opening statement, one of the prosecutors described the Intoxilyzer test procedure and revealed that a sample of defendant's breath produced a

reading which showed that he had .186 of 1 percent by weight of alcohol in his body fluid, more than one and a half times the ten-hundredths of 1 percent permitted by law.

The State argues that as defendant did not object to the prosecutor's statements during the opening statement, he cannot now be heard to complain about the fact that the prosecutor revealed the Intoxilyzer reading. It is true we have held that the overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve error. *State v. Harper*, 215 Neb. 686, 340 N.W.2d 391 (1983); *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983). It follows, therefore, that one wishing to preserve error on the basis of remarks contained in an opening statement generally must object to the questioned remarks when made, notwithstanding the overruling of a motion in limine. We have also noted, however, that a litigant may rely on a trial judge's announcement of what he or she will permit an opponent to do. *State v. Williams*, 212 Neb. 860, 326 N.W.2d 678 (1982). In the case before us the trial judge had overruled the motion in limine on the basis he did not know what foundation the State would be able to lay with respect to the Intoxilyzer test. Since the judge had acquired no further information in that regard at the time of the opening statement, it was not necessary that in order to preserve error the defendant object at that time to remarks the judge had already said he would permit the prosecutor to make.

While defendant's first assignment of error fails, it does so not because he did not object at the time the questioned remarks were made but because, as discussed in greater detail in connection with defendant's next assignment of error, the jury was admonished and instructed to disregard what it was told in that regard.

MOTION FOR MISTRIAL

The second assignment concerns the claim that the county court erred in failing to declare a mistrial. This claim is based on two events. The first occurred when Carlson was handed a "checklist" in order that it might be marked for identification as an exhibit while he was testifying as to the manner in which the Intoxilyzer test was performed. At this time Carlson was approximately 5 feet from the jury and handling an 8 1/2- by

11-inch exhibit which contained, among other things, hand-printed test results in figures approximately three-sixteenths of an inch high and seven-sixteenths of an inch long. Defendant objected on the ground that Carlson held the checklist exhibit in such a fashion that the jury could see the test results. In addition to lodging his objection, the defendant moved to voir dire the jury to determine whether anyone had actually seen the results reflected on the exhibit, and also moved for a mistrial.

The second event centers around the county court's determination that the Intoxilyzer test results were inadmissible, not because the machine failed to print the test results, but because during the discovery phase the State had inadvertently supplied defendant with maintenance records for the machine which covered a period other than that which last preceded the test. The county court reasoned that having been supplied with the wrong maintenance record, defendant had been prejudiced in the preparation of his defense to the Intoxilyzer test.

In overruling defendant's various motions, the county court directed Carlson to keep the checklist exhibit out of view, and observed that although the jurors may have seen the exhibit, it was unlikely that they were able to read the test results from such a distance.

The county court also informed the jury that all testimony concerning the Intoxilyzer chemical test had been stricken from the record, and admonished that "you are specifically instructed to disregard that testimony." The county court's charge to the jury included the following instruction:

> Certain statements were made by counsel, and testimony was adduced by a witness, regarding a chemical test performed by an intoxilyzer model 4011AS. Those statements made by counsel and that testimony regarding a chemical test were stricken from the record. You are instructed to disregard those statements and that testimony and neither should influence your verdict.

It is appropriate that at this point we review some basic rules relating to motions for mistrial. The first of these is that the determination of whether to grant such a motion lies within the

sound discretion of the trial court. *State v. Bostwick,* 222 Neb. 631, 385 N.W.2d 906 (1986); *State v. Archbold,* 217 Neb. 345, 350 N.W.2d 500 (1984). A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of other incompetent matters are examples of occurrences which may constitute such events. See, *State v. Bostwick, supra; State v. Archbold, supra.* Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. See, *State v. Ross*, 220 Neb. 843, 374 N.W.2d 228 (1985); *State v. Archbold, supra.* See, also, *State v. Vrchota*, 212 Neb. 567, 324 N.W.2d 394 (1982); *State v. O'Kelly*, 193 Neb. 390, 227 N.W.2d 415 (1975).

Defendant argues he was entitled to a mistrial because the revelation of the Intoxilyzer test results during the opening statement and the display of the checklist exhibit during Carlson's testimony were both done to present to the jury material the prosecutors well knew was inadmissible and that the combined damaging effect of the two events was not cured by the trial court's admonition and instruction to the jury.

It is true, as defendant argues, that a criminal defendant is entitled to a fair trial and that it is the responsibility of the prosecutor to see that the defendant receives such a trial. *State v. Atwater*, 193 Neb. 563, 228 N.W.2d 274 (1975). In recognition of that precept, the Code of Professional Responsibility adopted by this court includes as an ethical consideration to Canon 7, which provides that a lawyer should represent a client zealously within the bounds of the law, the following:

> The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental

> powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make time [sic] disclosure to the defense of available evidence known to him that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

Canon 7, EC 7-13, Code of Professional Responsibility (rev. 1984). Additionally, the following disciplinary rule has been adopted: "In appearing in his professional capacity before a tribunal, a lawyer shall not: (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence." Canon 7, DR 7-106(C)(1), Code of Professional Responsibility (rev. 1984).

Consequently, if the record were to have established that the prosecutors deliberately put before the jury the Intoxilyzer test results, knowing full well that that evidence was inadmissible, they would have been subject to discipline, no matter what the outcome of this case. The record does not, however, so establish. What the record does establish is that the prosecutors were in the process of laying the foundation one of them had represented would be adduced as a foundation for admitting the Intoxilyzer test into evidence. Without countervailing testimony, the fact that the Intoxilyzer failed to print the test results does not necessarily mean the machine did not properly measure the level of alcohol in defendant's blood. The record also shows the prosecutors were handling more than one case with defendant's counsel which involved Intoxilyzer test results. Thus, there existed a reasonable explanation for inadvertently giving defendant the wrong maintenance record.

We therefore conclude there was nothing so flagitious about the conduct of the prosecutors as to require the declaration of a mistrial. We also conclude there was nothing so indelibly damaging about the stricken remarks and evidence that the county court's admonition and instruction to the jury did not adequately protect defendant.

HORIZONTAL NYSTAGMUS TEST

There being no merit to defendant's second assignment of error, we move on to a consideration of his third assignment, that the county court erred in admitting Carlson's testimony about the field horizontal nystagmus test.

Carlson testified that he received training in administering the test at a seminar given at the State Patrol office in Lincoln. The seminar was taught by another patrol officer who had received his training elsewhere. During the seminar, Carlson performed the test on both intoxicated and sober volunteers and was able to compare the results from each group. The seminar concluded with a written examination, after which Carlson was given some sort of certificate.

The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982). Neb. Rev. Stat. § 27-702 (Reissue 1985) provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

The major difficulty with the testimony is that the record contains no competent evidence that this new test is valid, that is, that it in fact reveals the presence of intoxication. Evidence of a test result cannot be characterized as "scientific" or qualify as "technical or other specialized knowledge," and thus within the purview of § 27-702, unless and until it is established that the the test result demonstrates what it is claimed to demonstrate. It was such a failure of proof which led this court to conclude in *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949), that polygraph, or so-called "lie detector test," results had not gained such standing and scientific recognition as to

justify being admitted into evidence.

Thus, the county court erred in permitting Carlson to testify as to the administration and interpretation of the horizontal nystagmus test.

That conclusion does not, however, resolve the matter, for a conviction will not be set aside in the absence of a showing that an error created prejudice. *State v. Lynch,* 223 Neb. 849, 394 N.W.2d 651 (1986). No prejudice resulted from the error, because Carlson's opinion was based on a number of other factors, and, more importantly, the other evidence, as the discussion which follows demonstrates, overwhelmingly establishes that defendant was under the influence of alcohol to the extent that his driving abilities were substantially impaired. It should perhaps be noted, however, that counsel acts at his or her peril when undertaking to overprove a point. In a marginal case the receipt of improper evidence may well lead to a reversal of the trial result.

SUFFICIENCY OF EVIDENCE

Defendant's fourth and final assignment of error challenges the sufficiency of the evidence to support the jury's finding of guilt. In support of this assignment defendant reminds us of the testimony which contradicts that of Carlson and Stukenholtz. It, however, is a well-established axiom that in resolving a challenge to the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such is for the trier of fact and must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Hruza,* 223 Neb. 837, 394 N.W.2d 643 (1986); *State v. Ellis,* 223 Neb. 779, 393 N.W.2d 719 (1986). Stated more simply, it is not for this court to accept one version of a case over another; that is for the jury. *State v. Murphrey*, 220 Neb. 699, 371 N.W.2d 702 (1985). Moreover, it is well established that after a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if the evidence sustains some rational theory of guilt. *State v. Wilkening*, 222 Neb. 107, 382 N.W.2d 340 (1986).

There is more than sufficient evidence to sustain a rational theory of guilt. Carlson testified that upon the initial confrontation with defendant, he observed that defendant's eyes were bloodshot, that he smelled of alcohol, and that his speech was slurred. Further, defendant performed inadequately on several field sobriety tests. In addition, there was the matter of defendant's own admission as to the amount of alcohol he had consumed, and Stukenholtz's corroboration of many of the observations made by Carlson. Most importantly, there was defendant's erratic and dangerous driving itself.

DECISION

The judgment of the district court, being correct, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CONNIE K. NISSEN, APPELLANT.

395 N.W.2d 560

Filed October 31, 1986. No. 86-386.

1. **Criminal Law: Police Officers and Sheriffs: Evidence: Arrests.** Generally, as a practical matter, no criminal investigation is complete until sufficient facts have been obtained to justify the arrest and conviction of the defendant.
2. **Criminal Law: Police Officers and Sheriffs: Arrests.** The obligation of an officer making an arrest under a warrant is twofold: to apprehend the person named in the warrant and to avoid interfering with one not involved.
3. **Criminal Law: Police Officers and Sheriffs: False Reporting: Words and Phrases.** The language of Neb. Rev. Stat. § 28-907(1)(a) (Reissue 1985), "to impede the investigation of an actual criminal matter," includes the impeding of the gathering of information as to the identity of a defendant named in an arrest warrant.
4. **Criminal Law: Police Officers and Sheriffs: False Reporting: Arrests.** Law enforcement officers have a legitimate right to question persons about the identity of the subject of an arrest warrant before they arrest the suspect; and although persons so questioned may have the right to refuse to answer such inquiry, if they choose to answer they may not give false information without subjecting themselves to criminal liability.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

William G. Line of Kerrigan, Line & Martin, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

The defendant, Connie K. Nissen, appeals the district court's affirmance of a judgment of the county court for Dodge County finding her guilty of false reporting with intent to impede the investigation of an actual criminal matter. The county court imposed a sentence of 6 months' probation, which the district court affirmed. We also affirm.

On November 27, 1985, state trooper Gomez telephoned the Fremont Police Department and reported that a man named Vu Pham had just entered an apartment complex on West 9th and that there was an active warrant for his arrest. When Fremont police officer Burkhardt went to the apartment, several males and the defendant were present. Officer Burkhardt asked one of the men, Thu Van Le, whether Vu Pham was there. He said that Vu Pham was not at the apartment. Trooper Gomez then arrived and told Officer Burkhardt that Vu Pham had just walked in the back door.

The officer and the trooper proceeded into the apartment and asked Vu Pham if his name was Vu Pham, to which he replied, "No." They then asked the defendant if the person they believed to be Vu Pham was in fact him, and she said he was someone else. Thu Van Le then apparently became upset and ran into his bedroom and got a rifle. The officer cleared the apartment and then went outside to find Vu Pham, who had left the place where he was told to stay. Trooper Gomez came back to the defendant and asked her three times if the person they were looking for was Vu Pham. She denied that he was. After Trooper Gomez told her that she was in just as much trouble as Vu Pham was, she told him who Vu Pham was.

Officer Burkhardt testified he had told the defendant that he

had a warrant for Vu Pham's arrest. The officer also testified he was not sure who Vu Pham was. Trooper Gomez, on the other hand, said he knew all along Vu Pham was Vu Pham but assumed that he would have to have some sort of identification for Officer Burkhardt and the sheriff's office. Trooper Gomez also testified that if the defendant had told him who Vu Pham was initially, they would have just taken him and would have been gone and that the whole incident would have taken less time.

The defendant raises on appeal the single issue of whether the service of a misdemeanor warrant is an investigation of an actual criminal matter, so that the defendant's false statement as to the identity of the individual named in the warrant constitutes impeding the investigation of an actual criminal matter, proscribed by Neb. Rev. Stat. § 28-907(1)(a) (Reissue 1985).

In support of her contention that the service of a misdemeanor warrant is not an investigation of an actual criminal matter, the defendant relies solely on the construction of the words "actual criminal matter" found in *State v. Ewing*, 221 Neb. 462, 468, 378 N.W.2d 158, 162 (1985): "In using the words 'actual criminal matter,' the Legislature intended that law enforcement officers be required to prove the existence of *a legitimate and valid investigation of facts which could constitute a predicate offense* before a violation of the false reporting statute may stand." (Emphasis supplied.) Relying on that language, the defendant argues that when law enforcement officers are investigating a completed crime, the giving of the false information must impede an investigation of facts upon which the law enforcement officer could predicate another criminal offense before the provider of that false information can be convicted of violating § 28-907(1)(a). In this case the defendant argues that there was no further offense requiring investigation; the law enforcement officers were merely serving a misdemeanor warrant.

Although on its face the language quoted from *Ewing* does seem to support the defendant's contention, that language cannot be severed from the context of the facts in *Ewing* and blindly applied to the set of facts in this case.

In *Ewing* a police officer went to a trailer home with the mother of a 16-year-old girl to see if the girl was there. The mother had informed the officer that there was alcohol present in the trailer, that her daughter was smoking, and that she had been unable to remove her daughter from that environment. The officer went to the trailer, knocked, and asked the defendant if the girl was in the trailer house. The defendant responded that she was not there, that she had left. In fact, the girl was in the trailer and the defendant knew that. The girl was never arrested for any crime.

On appeal the defendant argued that in order for § 28-907(1)(a) to apply there must have been an actual crime committed of which the defendant's false information impeded the investigation. We determined that the term "actual criminal matter" was broader than "crime" and, thus, held that the giving of false information with the intent to impede the investigation of facts which could constitute a predicate offense was sufficient to trigger the application of the statute. It was not necessary for the State to prove that an actual crime was committed before someone could be convicted of false reporting. Because the officer reasonably believed a minor could be in possession of alcohol and someone could be contributing to the delinquency of a minor, the conviction of the defendant was affirmed.

Thus, in *Ewing* the words "actual criminal matter" were construed in response to the situation where a reasonable possibility existed that a crime was in progress. In this case we instead are confronted with a situation where some law enforcement officer had earlier had probable cause to believe that crimes had been committed so as to substantiate the issuance of arrest warrants. However, as a practical matter, no criminal investigation is complete until sufficient facts have been obtained to justify the arrest and conviction of the defendant.

Although not directly in point, in *Florida Freedom Newspapers, Inc. v. Dempsey*, 478 So. 2d 1128 (Fla. App. 1985), the Florida court, with reference to the definition of *criminal investigative information* as used in the Florida statutes relating to the exception of certain information from

the requirements of freedom of information statutes, went on to state that, in one respect, the law required criminal investigative information "to be furnished only after there has been an arrest or public charge made, such as the time, date, and location of the incident and *arrest* . . . ." (Emphasis supplied.) *Id.* at 1131.

Furthermore, as stated in *Wallner v. Fidelity & Deposit Co.*, 253 Wis. 66, 33 N.W.2d 215 (1948), the obligation of an officer making an arrest under a warrant is "twofold, to apprehend the person named in the warrant and to avoid interfering with one not involved." *Id.* at 69-70, 33 N.W.2d at 216.

We hold that the language of § 28-907(1)(a), "to impede the investigation of an actual criminal matter," includes the impeding of the gathering of information as to the identity of a defendant named in an arrest warrant. So as to avoid the possibility of false arrest suits, law enforcement officers have a legitimate right to question persons about the identity of the subject of an arrest warrant before they arrest the suspect. This is not to say that persons questioned may not have a right to refuse to answer such inquiry; but if they choose to answer, they may not give false information without subjecting themselves to criminal liability under § 28-907(1)(a).

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOEL R. EVANS, APPELLANT.

395 N.W.2d 563

Filed October 31, 1986. No. 86-413.

1. **Postconviction.** An evidentiary hearing on a motion for postconviction relief is not required if the motion, files, and records of the case show the defendant is not entitled to relief.
2. _____. Postconviction motions cannot be used to obtain a further review of issues already litigated, nor shall a defendant be permitted to rephrase issues already presented to achieve that end.
3. _____. Generally, a motion for postconviction relief may not be used to secure review of an issue which could have been raised on direct appeal.

4. _____. Once a motion for postconviction relief has been judicially determined, any subsequent motions for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of the filing of the prior motion.
5. **Effectiveness of Counsel.** The test of effective assistance of counsel involves a two-part determination: first, counsel must perform at least as well as an attorney in that area with ordinary skill in criminal law, and second, the attorney must conscientiously protect the client's interests. The defendant must also demonstrate how the absence of counsel's error would have changed the result in the case.
6. **Arrests: Probable Cause.** The test of probable cause for a warrantless arrest is whether, at the time of the arrest, the officer had knowledge of facts and circumstances based on reasonably trustworthy information which was sufficient to warrant a prudent man in believing the defendant had committed or was committing an offense.
7. **Right to Counsel: Identification Procedures: Indictments and Informations.** The right to counsel at a police lineup attaches only at or after the time when adversary judicial proceedings have been initiated against the defendant by way of complaint, indictment, or information.
8. **Miranda Rights: Constitutional Law: Self-Incrimination.** The *Miranda* warnings are procedural safeguards intended to secure the privilege against compelled self-incrimination.
9. **Trial: Effectiveness of Counsel: Witnesses.** The decision as to whether to call a witness is a matter of trial strategy within counsel's judgment.
10. **Prosecuting Attorneys: Convictions.** Generally, for prosecutorial misconduct to warrant vacation of a conviction, there must be evidence of prejudice to the defendant's right to a fair and impartial trial.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Joel R. Evans, pro se.

Robert M. Spire, Attorney General, and L. Jay Bartel, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The defendant, Joel R. Evans, has appealed from the order of the district court denying him postconviction relief and an evidentiary hearing on his second motion for postconviction relief pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985).

The facts surrounding the four cases in which the appellant was convicted and sentenced to imprisonment for 45 to 80 years are detailed in *State v. Evans*, 218 Neb. 849, 359 N.W.2d 790 (1984), where the judgment denying defendant's first motion for postconviction relief was affirmed.

On direct appeal the records in all four cases were examined by this court and found to be free from prejudicial error. Motions to withdraw filed by the defendant's counsel were sustained and the judgments affirmed on July 8, 1981.

On this appeal the defendant has assigned three general categories of error, that is, the district court erred (1) in failing to grant an evidentiary hearing, (2) in failing to appoint counsel, and (3) in failing to grant postconviction relief. The defendant claims 28 separate errors in support of his third general assignment of error.

We do not consider the defendant's second assignment of error, as that issue was not discussed in his brief. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986).

Consideration of the two remaining general assignments of error is necessarily combined, as an evidentiary hearing on a motion for postconviction relief is not required if the motion, files, and records of the case show the defendant is not entitled to relief. *State v. Apodaca*, 223 Neb. 258, 388 N.W.2d 837 (1986).

Postconviction motions cannot be used to obtain a further review of issues already litigated, nor shall a defendant be permitted to rephrase issues already presented to achieve that end. *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986). It is also true that, generally, a motion for postconviction relief may not be used to secure review of an issue which could have been raised on direct appeal. *State v. Peery, supra*. Further,

> once a motion for postconviction relief has been judicially determined, any subsequent motions for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of the filing of the prior motion.

State v. Rust, 223 Neb. 150, 155, 388 N.W.2d 483, 489 (1986).

On appeal from denial of the defendant's first motion for

postconviction relief, this court rejected claims of trial and appellate counsel's alleged ineffectiveness. Those claims were based on counsel's alleged failure to challenge tainted identifications; to obtain psychiatric examinations to determine the defendant's competence at the time of the offenses and to stand trial; to properly brief the issue of the prosecutor's alleged comment on the defendant's right to remain silent; and to appeal the sentence imposed as so excessive as to constitute cruel and unusual punishment. *State v. Evans*, 218 Neb. 849, 359 N.W.2d 790 (1984). The defendant's assignments of error 3b, 3c, 3e, 3h, 3i, 3j, 3k, 3*l*, 3m, 3o, 3p, 3s, 3w, 3x, 3y, 3AA, and 3bb all generally relate to one of the issues determined in *State v. Evans, supra*, and were properly rejected for relitigation by the district court.

All but one of the remaining claims could have been raised on direct appeal, where this court found the trial records to be free of prejudicial error. See *State v. Evans, supra*. The one claim previously unavailable is the defendant's assertion that counsel on his first postconviction motion provided ineffective assistance "in failing to properly preserve, present, and argue the substantive constitutional issues." Consequently, we consider the issues not previously raised only as they relate to the alleged ineffectiveness of counsel on the defendant's first motion for postconviction relief. See *State v. Rust, supra*.

The test of effective assistance of counsel involves a two-part determination: first, counsel "must perform at least as well as an attorney in that area with ordinary skill in criminal law, and second, the attorney must conscientiously protect the client's interests." *State v. Birge,* 223 Neb. 761, 763, 393 N.W.2d 713, 715 (1986). The defendant must also demonstrate how the absence of counsel's error would have changed the result in the case. *State v. Birge, supra.*

Initially, the defendant maintains he was illegally arrested on April 27, 1980, without a warrant and without probable cause. The test of probable cause for a warrantless arrest is whether, at the time of the arrest, the officer had knowledge of facts and circumstances based on reasonably trustworthy information which was sufficient to warrant a prudent man in believing the defendant had committed or was committing an offense. *State*

v. Ware, 219 Neb. 594, 365 N.W.2d 418 (1985); *State v. Tipton*, 206 Neb. 731, 294 N.W.2d 869 (1980). Testimony by the arresting officer in this case shows the defendant's claim to be without merit.

The deputy sheriff testified that he originally stopped the defendant after the defendant was observed walking in a field near the Papio Creek, which was being watched by authorities for the suspect in a recent armed robbery of a nearby restaurant. The defendant met the description of the robbery suspect aired in the police broadcast. A pat-down search revealed the defendant was carrying a handgun, several $1 and $5 bills, and a large amount of change. The defendant's pants were muddy on an otherwise dry evening. The defendant was returned to the robbery scene and separately identified as the robber by two eyewitnesses approximately 45 minutes after the crime. Clearly, there was probable cause to arrest the defendant at that time. Counsel on the defendant's first postconviction motion cannot be said to have acted ineffectively by failing to raise a meritless issue.

The defendant next contends that his rights were violated by placing him in lineups following his arrest without the opportunity to contact counsel, without being advised of the charges against him, and without being advised of the *Miranda* warnings.

The lineups in question occurred before any of the informations had been filed against the defendant. The right to counsel at a police lineup attaches only at or after the time when adversary judicial proceedings have been initiated against the defendant by way of complaint, indictment, or information. *State v. Ellis*, 219 Neb. 408, 363 N.W.2d 389 (1985). See, also, *State v. Saylor*, 223 Neb. 694, 392 N.W.2d 789 (1986).

The defendant does not explain how the alleged failure of the police to advise him of the charges against him denied him of any rights.

Further, there is no evidence that any statements made by the defendant while being subjected to custodial interrogation were introduced into evidence in any of his trials. The *Miranda* warnings are procedural safeguards intended to secure the privilege against compelled self-incrimination. *State v. Saylor,*

supra. Since no statements by the defendant were introduced against him in the present cases, the alleged failure to advise him of his *Miranda* rights is without significance. As there is no merit to these arguments, counsel cannot be said to have acted ineffectively in failing to raise them.

Similarly, the defendant contends he was improperly questioned by law enforcement authorities while in custody and after requesting an attorney. He also asserts that the police officers attempted to compel him to provide a handwriting exemplar without the assistance of counsel. Again, there is an absence of evidence demonstrating that these alleged police tactics resulted in statements or handwriting exemplars which might have been suppressible. As such, there is no merit to these arguments, and counsel cannot be faulted for failing to raise a frivolous issue.

Next, the defendant argues that trial counsel was ineffective in refusing to call his brother-in-law as an alibi witness in the trial for the April 27, 1980, robbery. It is urged that this testimony would have shown that a short time prior to the crime the defendant was playing pool at a bar some distance from the robbery. The defendant maintains that this testimony would have proved that it was difficult, if not impossible, for him to have committed the robbery, given the distances involved.

The decision as to whether to call a witness is a matter of trial strategy within counsel's judgment. *State v. Lofquest*, 223 Neb. 87, 388 N.W.2d 115 (1986). The effect of the brother-in-law's testimony would have been to corroborate the defendant's own testimony regarding his whereabouts and possessions just prior to the April 27 robbery. In a signed statement attached to the defendant's present motion for postconviction relief, the brother-in-law states that he was waiting outside the courtroom to be called as a witness for the trial on the April 27 robbery. He states further that the defendant's trial attorney became upset with him (the brother-in-law) when counsel witnessed him speaking with an old friend who was a juror in a different case. Because the witness was conversing with the juror, counsel refused to call him to testify.

Given the several eyewitness identifications of the defendant, and his possession, upon capture, of a large sum of

money and of a gun similar to that used in the robbery, it is difficult to see how the brother-in-law's cumulative testimony would, with a reasonable probability, have changed the result in this case. See *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986). Thus, the defendant has not met his burden to show that postconviction counsel acted ineffectively in failing to raise this issue.

Next, the defendant contends there was prosecutorial misconduct in his September 8-9, 1980, trial. He alleges that the prosecutor had contact with the jury, in the jury room, outside the presence of the judge, defendant's counsel, and the defendant. The defendant makes no allegation as to the nature of the alleged contact. He does assert that the jury returned its guilty verdicts shortly after the encounter. There is no allegation, however, showing how or even if the defendant was prejudiced by this alleged contact. Generally, for prosecutorial misconduct to warrant vacation of a conviction, there must be evidence of prejudice to the defendant's right to a fair and impartial trial. See, *State v. Costello*, 199 Neb. 43, 256 N.W.2d 97 (1977); *Lindsay v. State*, 46 Neb. 177, 64 N.W. 716 (1895). Absent any allegation of prejudice beyond the defendant's mere conclusory statements, postconviction counsel cannot be said to have acted ineffectively nor to have prejudiced the defendant's case by failing to raise this issue.

The defendant argues that he was denied a fair sentencing hearing because the presentence report contained false, inaccurate, and misleading information. The information objected to includes statements indicating that he was arrested for crimes in which there was no prosecution, the charges were dropped, or the defendant was not represented by counsel. A review of the sentencing hearing shows that the court was well aware that some of the charges were either dismissed or not prosecuted. The defendant does not explain how the alleged absence of legal representation in any of those cases resulted in false, misleading, or inaccurate information in the report.

He also complains that the report reflects a lack of an employment history, when he had in fact worked construction and other jobs. A review of the August 1980 report indicates the defendant was employed by his father from 1973 to 1979 and

had worked at numerous jobs since his divorce in 1979. It is difficult to see how the defendant could have been prejudiced by the failure to mention his construction work. In fact, at his trial for the April 27, 1980, robbery, the defendant admitted he was not working regular jobs and was unemployed on the date of the robbery.

The defendant contends the report also falsely stated that he had not paid child support, when in fact his wages had been garnisheed to satisfy that obligation. Our review shows that the garnishment of wages is reflected in the report.

Finally, the defendant argues he did not admit commission of the robberies to the probation officer, as reflected in the report. The report indicates the defendant admitted to all but one of the robberies that went to trial. Given the fact that the defendant was found guilty by unanimous jury verdicts, it is again difficult to perceive how the defendant was prejudiced by the allegedly false admissions. As such, postconviction counsel cannot be said to have acted ineffectively nor to have prejudiced the defendant's case by failing to raise the presentence report issues.

Because the motions, files, and records show no entitlement to postconviction relief, the district court was not clearly wrong in denying the defendant's request for an evidentiary hearing. The judgment is, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN DAVID ANDREAS, APPELLANT.

395 N.W.2d 569

Filed October 31, 1986. Nos. 86-460, 86-461.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Affirmed as modified.

Steven R. Brott, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The appellant, John David Andreas, was charged in case No. 86-460 with theft by receiving stolen property in violation of Neb. Rev. Stat. § 28-517 (Reissue 1985). In a second count he was charged with carrying a concealed weapon in violation of Neb. Rev. Stat. § 28-1202(1) (Reissue 1985). He was further charged in case No. 86-461 with assault in the second degree in violation of Neb. Rev. Stat. § 28-309(1) (Reissue 1985). As part of a plea agreement, Andreas pled guilty to all three charges. The district court then sentenced Andreas. On count I in case No. 86-460, he was sentenced to imprisonment for a term of 20 years and fined $25,000. On count II, carrying a concealed weapon, he was sentenced to imprisonment for a term of 5 years and fined $10,000, the sentence to be consecutive to the sentence on count I. In case No. 86-461 he was sentenced to imprisonment for a term of 5 years and fined $10,000, the sentence to be consecutive to the sentences previously imposed in case No. 86-460.

Andreas, in his appeal to this court, does not maintain that the prison terms were excessive, but maintains only that the imposition of the fines was excessive and should be reduced. We have reviewed the record, and we find no abuse of discretion. We have consistently held that a sentence imposed within statutory limits will not be modified absent an abuse of discretion on the part of the sentencing judge. *State v. Pearson*, 215 Neb. 339, 338 N.W.2d 445 (1983). Being unable to find any abuse of discretion, we do not believe that there is any basis to modify the sentences on that ground.

The Attorney General, however, has called our attention to one matter which does require us to modify one of the sentences. In 1984 the Legislature of the State of Nebraska amended the penalty for the crime of carrying a concealed weapon. Prior to the amendment, the crime of carrying a concealed weapon was a Class IV felony, punishable by up to 5

years' imprisonment and a fine of $10,000. However, by reason of the amendment to § 28-1202, carrying a concealed weapon, first offense, is now a Class I misdemeanor, punishable by imprisonment up to 1 year and a fine not to exceed $1,000. In view of the fact that the sentence was clearly in excess of the court's authority, we are compelled to modify that portion of the sentence. We believe no purpose will be served by returning the case to the district court for sentencing, but, rather, we simply reduce the sentence on count II in case No. 86-460 to imprisonment for a period of 1 year and a fine of $1,000, the sentence to be served consecutively to the sentence imposed in count I in case No. 86-460. In all other respects the sentences of the district court are affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. JAMES HAVERKAMP, APPELLANT.
395 N.W.2d 570

Filed October 31, 1986. Nos. 86-472, 86-473.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Affirmed as modified.

Curtis L. Maschman of Kotouc, Fankhauser & Maschman, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Appellant pled guilty to each of three counts filed in two informations: theft by receiving stolen property (Neb. Rev. Stat. § 28-517 (Reissue 1985)), a Class III felony; carrying a concealed weapon (Neb. Rev. Stat. § 28-1202(1) (Reissue

1985)), a Class I misdemeanor if the offense is a first offense; and assault in the second degree (Neb. Rev. Stat. § 28-309(1) (Reissue 1985)), a Class IV felony.

The trial court sentenced the appellant to 20 years' imprisonment (effectively 1 to 20 years) and ordered him to pay a $25,000 fine on count I. He was sentenced to a term of 5 years' imprisonment on count II and ordered to pay a $10,000 fine. The trial court sentenced appellant to a term of 5 years' imprisonment (effectively 0 to 5 years) and ordered him to pay a $10,000 fine on count III. All terms of incarceration were ordered to run consecutively, and credit was given for 315 days of jail time awaiting sentence.

The sentences for counts I and III are well within the statutory limits and are not excessive, nor are they an abuse of the trial court's discretion, and are therefore affirmed.

As to count II, the sentence of 5 years' imprisonment and a $10,000 fine must be modified. In 1984 the Legislature amended the penalty for carrying a concealed weapon, changing a first offense for this crime from a Class IV felony to a Class I misdemeanor. 1984 Neb. Laws, L.B. 1095. The penalty imposed by the district court exceeds the statutory limits for a Class I misdemeanor and is hereby reduced to a term of 1 year. The appellant is further ordered to pay a $1,000 fine. See, Neb. Rev. Stat. § 29-2308 (Reissue 1985); *State v. Goham*, 187 Neb. 34, 187 N.W.2d 305 (1971).

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLANT, V. TED SALTZMAN, APPELLEE.
395 N.W.2d 530

Filed October 31, 1986. No. 86-588.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Reversed.

Randy R. Stoll, Seward County Attorney, for appellant.

Bruce E. Stephens, for appellee.

GRANT, J.

This case comes before a single judge of this court by way of an appeal by the State from a ruling of the district court sustaining defendant's motion to suppress defendant's statements made to a Nebraska State Patrol investigator. Defendant's statements were made after the investigator told defendant that allegations had been made that defendant had committed certain acts supporting a possible offense of first degree sexual assault on a child. The facts of this case are much the same as those set out in the one-judge opinion in *State v. Meyers,* 223 Neb. 773, 393 N.W.2d 533 (1986). Indeed, the allegations against appellee concerned a young female child of the same family as that involved in *Meyers, supra.*

As was true in *Meyers,* I conclude that this review is controlled by the rule that the trial court's findings of fact in ruling on a motion to suppress evidence will not be overturned on appeal unless, given the totality of the circumstances, the findings are clearly wrong. *State v. LaChappell,* 222 Neb. 112, 382 N.W.2d 343 (1986); *State v. Bowersmith, ante* p. 6, 395 N.W.2d 527 (1986).

In this case the facts elicited at the hearing on defendant's motion to suppress showed the following. On February 5, 1986, at about 1 p.m., Chief Lowell Sellmeyer of the Milford Police Department telephoned appellee, Ted Saltzman, advising him that a state investigator was at the city hall in Milford and Saltzman could talk to him if he wanted to. A few days earlier, on January 30, 1986, Sellmeyer had received a report indicating that Saltzman might be sexually involved with an 11-year-old female. Saltzman apparently learned about this inquiry and contacted Sellmeyer at the police station. At some previous time Saltzman had expressed a desire to speak to a state investigator.

After Sellmeyer's call on February 5, Saltzman drove to city hall. There, Chief Sellmeyer introduced him to investigator Adler of the Nebraska State Patrol. Both Sellmeyer and Adler testified that Saltzman was not in custody at this time.

Investigator Adler advised Saltzman of the nature of the investigation, advised him that he was not under arrest, told

him that he was free to go at any time, and told him that if he did not want to answer any of Adler's questions, he did not have to. Adler also told him that if he did decide to talk to Adler, he would be free to leave at the conclusion of the interview. Saltzman testified that Adler told him that he could leave at any time and did not have to talk to him.

Saltzman agreed to talk to investigator Adler. They went to a room located in a hallway off of the police department. During this initial 45-minute interview, Saltzman admitted sexual involvement with a young female child. Adler testified that he made no threats or promises to Saltzman prior to obtaining these statements.

After Saltzman's initial statement, he and investigator Adler moved to a larger room so that a videotaped statement could be given. A video tape camera was activated, and Saltzman again related his sexual involvement with the child. At the conclusion of the videotaped statement, Saltzman was not arrested and was allowed to leave the Milford Police Department. The videotaped statement was received as an exhibit in the suppression hearing and was shown to this reviewing judge in the presence of counsel for the parties.

Appellee contends he was pressured into making his statements. He alleges that investigator Adler's voice went up when he questioned him. On cross-examination, however, Saltzman testified Adler's voice was not really loud and that Adler did not scream. Saltzman admitted that he generally gets nervous when speaking to the police, but also admitted that he was not physically threatened and was advised that he could leave.

For all the reasons set out in *State v. Bowersmith, supra*, it must be concluded that Saltzman was not in custody at the time he made his inculpatory statements to Adler and that the trial court's findings and rulings thereon are clearly wrong. The ruling appealed from is reversed.

REVERSED.

DALE DOBROVOLNY, APPELLANT, V. LLOYD WANISKA, APPELLEE.
395 N.W.2d 480

Filed October 31, 1986. No. 86-616.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Reversed and remanded with directions to dismiss.

Dale Dobrovolny, pro se.

Lloyd Waniska, pro se.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The appellant, Dale Dobrovolny, initially filed a small claim in the county court for Richardson County, Nebraska, claiming $770 due for baling hay. Judgment was entered for Dobrovolny and against Waniska in the amount of $420 plus costs. Dobrovolny appealed to the district court for Richardson County, where the district court affirmed the judgment of the county court. Still dissatisfied with the result, Dobrovolny then appealed to this court, maintaining that the judgment which the court entered should have been for $770 plus interest from January 1, 1982. For reasons more specifically set out herein, we regret that we must reverse and remand with directions to dismiss.

The judgment entered by the district court on June 19, 1986, reads as follows: "Matter came on for trial; petitioner *failed* to appear; defendant's [sic] appeared pro se. Court affirms judgment entered in County Court. Bailiff to notify parties and County Court." (Emphasis supplied.)

Unfortunately, however, under the provisions of Neb. Rev. Stat. § 24-541.07 (Reissue 1985), appeals from small claims court to the district court are tried "de novo." The district court's entry and the absence of a bill of exceptions in this case make it clear that in fact no trial was had, no evidence was adduced, and, therefore, no judgment could be entered. Absent evidence, which appellant was obligated to produce, there was no basis for the district court to enter a judgment for the

plaintiff. In *Fuchser v. Jacobson*, 205 Neb. 786, 788, 290 N.W.2d 449, 451 (1980), we said: "Inasmuch as no specific theories of recovery are required to be pleaded in Small Claims Court, that court's decision must be affirmed by the District Court if it can be founded on any theory *supported by the evidence*." (Emphasis supplied.) The problem in the instant case, however, is that there is no evidence to support the verdict.

It is, of course, unfortunate that such a result must prevail. Nevertheless, if parties choose to represent themselves and fail to appear when it is necessary for them to be present and offer evidence, they must, of necessity, accept the consequences of their acts.

There being no evidence to support the judgment entered by the district court, the judgment must be reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

ED CHLOPEK AND KARL CHLOPEK, APPELLEES, V. KELLY J. SCHMALL, JAMES H. SCHMALL, AND JO ANN L. SCHMALL, APPELLANTS.

396 N.W.2d 103

Filed November 7, 1986. No. 85-092.

1. **Judgments: Appeal and Error.** The findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
2. **Motor Vehicles: Negligence.** It is a general rule that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course be changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he is traveling.
3. _____: _____. The basis of the foregoing rule is that the driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object in front of him.
4. **Motor Vehicles: Highways.** A driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway. After having stopped, such driver shall yield the right-of-way to any vehicle which is

approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves his vehicle into or across such intersection.

5. **Property: Damages.** Where the damage to personal property can, at a reasonable cost, be repaired and the property restored to substantially its condition immediately before the damage occurred, and the cost of repair does not exceed the difference in market value of the property before and after the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the loss of use of the property for the reasonable amount of time required to complete the repair.
6. _____: _____. Where the damage to personal property is such that it cannot be repaired and the property thereby restored to substantially its condition immediately before the damage occurred, or when the reasonable cost of repair exceeds the difference in market value of the property immediately before and immediately after the injury, the measure of damages is the lost market value plus the reasonable value of the loss of use of the property for the reasonable amount of time required to obtain a suitable replacement.
7. _____: _____. The reasonable value of the loss of use of personal property is generally the fair rental value of property of a like or similar nature or the amount actually paid for rental, whichever is less.
8. _____: _____. Where property used for commercial or business purposes cannot be rented, then loss of profits may establish the reasonable value of the loss of use.
9. **Property: Damages: Case Overruled.** To the extent that any prior cases would limit the total compensation for damage to personal property to the fair market value of the property immediately before the injury, they are expressly overruled.
10. **Pleadings.** A pleading may be amended in furtherance of justice, to conform to the proof, if the proposed amendment does not change substantially the claim or defense. The decision to allow or deny such amendment rests in the sound discretion of the court.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

Michael J. Javoronok of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellants.

James R. Hancock of Hancock & Denton, P.C., and Robert G. Pahlke of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an action for damages by the plaintiffs, Ed and Karl Chlopek, resulting from a collision between a truck with a "pup" trailer, owned by the plaintiffs, and an automobile operated by defendant Kelly J. Schmall, which was owned by her parents, defendants James H. and Jo Ann L. Schmall.

The pleadings raised issues of defendant Kelly Schmall's negligence, the contributory negligence of plaintiffs' driver, and the nature and extent of plaintiffs' damages.

Both parties filed motions for summary judgment, plaintiffs seeking judgment on all issues and defendants seeking partial summary judgment on the issue of whether, as a matter of law, plaintiffs could recover as damages loss of use of the truck and pup trailer if the property was totally destroyed, that is, if the cost to repair the truck and trailer exceeded their market value before the accident.

In deciding the summary judgment motions, the district court determined that defendant Kelly Schmall was negligent and that her negligence is imputed to defendant James Schmall, her father and the head of the family. The trial court further found that the actual damages to the truck, trailer, and other personal items in the truck totaled $49,947.40. The court also determined that, as a matter of law, where a commercial truck is totally destroyed, plaintiffs may recover damages for loss of use of the truck until another truck can be obtained, and where a rental truck is not available, then the loss of use is measured by the loss of profits.

The balance of the summary judgment motions were overruled, and the case proceeded to trial to the court on the remaining issues of the contributory negligence of plaintiffs' driver and the amount of damages for loss of use of the truck and pup trailer.

Following trial, the district court found that plaintiffs' driver was not negligent and that plaintiffs suffered a loss of profit, until they could replace the truck, in the sum of $13,225.18, and entered judgment against all three defendants in the total sum of $63,172.58.

At the hearing on defendants' motion for new trial, plaintiffs were given leave, over objection, to amend the total amount of

the prayer of their petition, up to the amount of the judgment, a difference of $364.81. Defendants' motion for new trial was then overruled, and this appeal followed.

Defendants on appeal do not challenge the trial court's finding that defendant Kelly Schmall was negligent or the amounts of the damages determined. They do assign as error: (1) The trial court's finding that plaintiffs' driver was not contributorily negligent; (2) The allowance as a matter of law of damages for loss of use of a totally destroyed commercial vehicle; and (3) Abuse of discretion in allowing plaintiffs to amend their petition after trial and judgment.

We note at the outset that the district court's entry of partial summary judgment held that the negligence of Kelly J. Schmall was to be imputed only to her father, James H. Schmall, as head of the family, under the Nebraska family purpose doctrine. Although not assigned as error, Jo Ann L. Schmall should have been dismissed from the suit, since, as a result of that holding, no negligence could be imputed to her, and the amended petition contained no allegations that she was personally negligent. The judgment against her is reversed and the petition is ordered to be dismissed as to her.

We turn to defendants' contention that the trial court erred in finding that plaintiffs' driver was not contributorily negligent. Our review of this issue is governed by what we have often said:

> [T]he findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In such a circumstance it is not within our province to resolve conflicts in or to weigh the evidence; if there is a conflict in the evidence, this court will review the judgment rendered and will presume that controverted facts were decided in favor of the successful party.

Wheeler Constr. v. Town & Country Realty, 217 Neb. 424, 427, 348 N.W.2d 890, 892 (1984); *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983).

The accident took place at the intersection of U.S. Highway 26, an east-west highway, and a north-south county road in Morrill County, Nebraska. Highway 26 is protected by stop signs on the county road.

Steven Doornbos was driving plaintiffs' truck and the pup trailer loaded with approximately 94,000 to 100,000 pounds of sugar beets. He testified that he was proceeding west on Highway 26, and as he crested an incline he saw defendants' car stopped behind the stop sign on the county road on the north side of the intersection, facing south. He was about 1,000 feet from the intersection at that point. Defendant's car remained stopped until Doornbos was 500 to 700 feet from the intersection, then moved forward and stopped again. When he was 400 feet from the intersection and moving at about 50 m.p.h., the car proceeded into the intersection in front of him. He applied his brakes, but as the car continued to move across the westbound lane, he released his brakes and swerved to his left to avoid a collision, which was unsuccessful, the vehicles colliding just across the centerline of Highway 26 in the eastbound lane. After impact, the truck veered back toward the centerline, overturned on its side, slid down the highway, rotated twice, and caught fire.

Kelly Schmall, by deposition, testified that at the time of the accident she was 14 years of age and was driving her parents' automobile on a learner's permit. Riding in the car with her were her 16-year-old sister and 11-year-old brother. The three were going to school and were late getting started.

Kelly drove south on the county road to Highway 26 and stopped at the stop sign. She then moved forward to the edge of the highway and stopped again, intending to turn left and proceed east on Highway 26. She looked to her left, but a glare off a road sign to the east made it difficult to see anything. She pulled onto the highway, saw plaintiffs' truck about 100 feet away, stopped, and tried to put the gear in reverse. She remembers nothing else.

There is no significant conflict in the versions of the two drivers. Defendants argue that the truck was traveling at an excessive speed under the conditions existing. Those conditions were that traveling at 50 m.p.h., Doornbos estimated it would take him one-quarter to one-half mile to stop the loaded truck and pup trailer, that he was aware of a sign (the one whose glare blinded Kelly Schmall) which said "slow moving trucks" as he approached the intersection, and was aware of defendants' car

stopped at the stop sign when he was 1,000 feet from the intersection.

In addition, defendants rely on evidence that the load on the truck and trailer violated the maximum allowed by statute and that plaintiffs violated Neb. Rev. Stat. § 39-6,133 (Reissue 1984) in that the truck and trailer were not equipped with a braking system adequate to bring the vehicle traveling at 20 m.p.h. to a stop in a distance of not more than 65 feet. Violation of such statutes, however, does not constitute negligence in and of itself, but is merely evidence of negligence. *Hartman v. Brady*, 201 Neb. 558, 270 N.W.2d 909 (1978). The trial court must have determined that any such negligence was not a proximate cause of the collision. We agree.

The crucial question to be decided is whether plaintiffs' operator was negligent in driving the truck at 50 m.p.h. on Highway 26 at a point 400 feet from an intersection and knowing that (1) an automobile was stopped at the stop sign protecting his lane of travel and (2) he could not stop the truck at that speed in less than one-quarter mile. In other words, was his speed excessive under those conditions and circumstances?

In arguing that it was excessive, defendants would invoke the "range of vision" rule. It is a general rule that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he was traveling. See *Ritchie v. Davidson*, 183 Neb. 94, 158 N.W.2d 275 (1968). In *Ritchie* we went on to say at 97, 98, 158 N.W.2d at 277:

> " 'The basis of the foregoing general rule is that the driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object *in front of him*.' "

(Emphasis supplied.)

The foregoing rule is not applicable here. Plaintiffs' driver was not approaching any vehicle or object in front of him, but was approaching an intersection on the favored highway

protected by stop signs, where Kelly Schmall was stopped before pulling out in front of him. The applicable rules are:

> A driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway. After having stopped, such driver shall yield the right-of-way to any vehicle which is approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves his vehicle into or across such intersection. . . . It is such a driver's duty to look both to the right and to the left and to maintain a proper lookout for the safety of himself and others traveling on the streets. . . .
>
> A person traveling on a favored street protected by stop signs of which he has knowledge may properly assume, until he has notice to the contrary, that motorists about to enter from a nonfavored street will observe the foregoing rules.

Hartman v. Brady, supra at 562, 270 N.W.2d at 911-12.

Plaintiffs' driver was traveling on a national highway within the speed limit. Defendants would require him to operate at such a speed as he approached an intersection protected by stop signs so as to stop or swerve and avoid a collision with a motorist who pulls in front of him, regardless of his distance from the intersection at the time. Plaintiffs' driver had no duty to engage in such defensive driving. The trial court was correct in concluding that plaintiffs' truck was at such distance as to constitute a hazard when Kelly Schmall pulled out in front of it and that her negligence in doing so was the sole proximate cause of the accident. Any violation of statutes regarding maximum load of the truck or required braking distance was not evidence of any negligence that was a proximate cause of the accident.

In allowing plaintiffs the sum of $13,225.18 as damages for loss of use of the truck until a suitable replacement could be obtained, the trial court departed from our prior holdings as to measure of damages for damage to a motor vehicle. In *Helin v. Egger*, 121 Neb. 727, 728-29, 238 N.W. 364, 365 (1931), we established the rules to measure the damages by quoting with approval from *Langham v. Chicago, R. I. & P. R. Co.*, 201

Iowa 897, 208 N.W. 356 (1926), as follows:

> "When the automobile is totally destroyed, the measure of damages is its reasonable market value immediately before its destruction.
>
> "Where the injury to the car can be repaired, so that, when repaired, it will be in as good condition as it was before the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the use of the car while being repaired, with ordinary diligence, not exceeding the value of the car before the injury.
>
> "When the car cannot, by repair, be placed in as good condition as it was in before the injury, then the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident."

Our holdings have consistently adhered to these rules. *Lund v. Holbrook*, 153 Neb. 706, 46 N.W.2d 130 (1951); *Dorn v. Sturges*, 157 Neb. 491, 59 N.W.2d 751 (1953); *Riley v. National Auto Ins. Co.*, 162 Neb. 658, 77 N.W.2d 241 (1956); *Wylie v. Czapla*, 168 Neb. 646, 97 N.W.2d 255 (1959); *Neill v. McGinn*, 175 Neb. 369, 122 N.W.2d 65 (1963); *Sky Harbor Air Service, Inc. v. Lang*, 194 Neb. 428, 231 N.W.2d 704 (1975); *Hatch v. Heim*, 200 Neb. 735, 265 N.W.2d 444 (1978); *Husebo v. Ambrosia, Ltd.*, 204 Neb. 499, 283 N.W.2d 45 (1979).

Generally, the law in Nebraska has been that damages allowed are limited to an amount not to exceed the fair market value of the motor vehicle immediately prior to the accident. Thus, previously in those instances where the vehicle was totally destroyed or where repairs could not restore it to substantially its condition before the collision, no damages for loss of use were allowed. Even where the vehicle could have been repaired, damages for loss of use were allowed only to the extent that the combined cost of repair and the loss of use did not exceed the value of the vehicle before the accident.

The trial court relied on *Long v. McAllister*, 319 N.W.2d 256 (Iowa 1982), in allowing loss of use damages to the totally destroyed truck. Ironically, the Iowa Supreme Court in *Long* allowed loss of use damages, and in so doing modified (in effect

overruled) its prior rules first formulated in *Langham v. Chicago, R. I. & P. R. Co., supra*, the case we cited with approval when our identical rules were established in *Helin v. Egger, supra*. The measure of recovery in all civil cases is compensation for the injury sustained. *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975); *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960). Considering that longstanding rule of law, we deem it appropriate to reexamine our rules which limit loss of use damages.

It does not appear that in any of our prior holdings we articulated any rationale for the limitation of damages to the market value of the vehicle immediately before the accident. In the opinion of the Iowa Supreme Court,

> Damages for destruction of chattels were based on analogy to conversion. The reasonable market value of the chattel was viewed as adequate compensation under this concept in the common law action of trover. The rigidity of the analogy obscured any distinction between destruction of chattels generally and destruction of chattels of such utility that the owners incurred loss of use expense. Perhaps this distinction became important only with the advent of the motor vehicle and the practice of motor vehicle leasing and rental.

Long v. McAllister, supra at 259.

In D. Dobbs, Handbook on the Law of Remedies, *Tangible Property—Damages, Destruction, and Retention* § 5.11 at 384-85 (1973), three arguments are suggested for denying loss of use damages:

> Loss of use claims are most commonly asserted for a period of time when the chattel is being repaired, but sometimes the chattel is destroyed and is not repairable. In such cases, loss of use claims are sometimes asserted for the period required to replace the chattel. A number of courts have refused to permit loss of use awards in cases of total destruction, and have limited recovery in such cases to the value of the article. Destruction, of course, was closely analogous to a conversion, where the measure of damages was the value of the chattel at the time of conversion, and it was natural enough to import the

conversion measure into the destruction situation. There was probably some thought that the market value of the chattel—which reflected the right to use it gainfully—plus interest for the time the owner was deprived of it, actually furnished full compensation. Another argument made against granting loss of use where there was total destruction sounds rather strange in modern ears. The authors of Sedgwick on Damages argued that when compensation for the whole value of the property destroyed is sought, "it is upon the theory that the plaintiff's entire interest in the property ceased at the time of the injury, and was replaced by a right to have the value of the property in money. Since, therefore, the plaintiff no longer has title to the property, he can no longer claim that he might make a future gain from it. . . ." Such an argument probably would not be accepted, or even thought of, today. It is a conceptual argument that does not interest itself in whether the owner has actually lost something of value beyond the market value of his property; it interests itself only in a legal concept—passage of title—that is not a part of the real world of facts and has no significant relation to important facts of actual loss. A third argument against granting loss of use recovery where a chattel is totally destroyed is that to grant such recoveries opens the door to speculation. This argument, if acceptable, would seem to apply equally to any loss of use claim, whether there was destruction or merely damage. But the argument does not seem acceptable, because there is no essential reason why loss of use claims must be speculative. There is nothing speculative about the cost of a rental car for a specified time while the *damaged* vehicle is being repaired, nor is there anything speculative about the cost of a rental car for a specified time while a *destroyed* vehicle is being replaced. If loss of use leads also to loss of profits, they are speculative as much or as little as other claims of lost profits and the question of speculation becomes in the end, a question whether the evidence of loss is sufficient in each case.

The number of jurisdictions which allow loss of use damages even in total destruction cases is extensive and reflects the trend in this area. See Annot., Recovery for Loss of Use of Motor Vehicle Damaged or Destroyed, 18 A.L.R.3d 497 (1968). See, also, Restatement (Second) of Torts § 927 (1979).

The court in *Long v. McAllister,* 319 N.W.2d 256, 259 (Iowa 1982), expressed well the illogic of its former rules (the same as our present rules):

> [W]hen the vehicle can be restored by repair to its prior condition, the owner is not only entitled to compensation for the reasonable cost of repair but for reasonable loss of use damages. Although market value is nevertheless a ceiling on recovery even in this situation, full compensation is possible when the cumulated damages do not exceed the limitation.
>
> In other cases, however, the present rules plainly do not permit full compensation. Loss of use damages will be incurred as readily when a vehicle is totally destroyed or when it cannot be restored by repair to its prior condition as when the vehicle can be restored by repair. Just as loss of use damages are necessary for full compensation when the vehicle can be restored to its prior condition, they are warranted when the vehicle is destroyed or cannot be so restored. No logical basis exists for cutting them off when the total reaches the vehicle's market value before the injury.

Compensation for injuries sustained as to the measure of recovery means *full* compensation, an amount that will make the damaged party whole. Denying loss of use damages as a matter of law thwarts this fundamental principle. Therefore, our rules are modified as follows:

1. Where the damage to personal property can, at a reasonable cost, be repaired and the property restored to substantially its condition immediately before the damage occurred, and the cost of repair does not exceed the difference in market value of the property before and after the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the loss of use of the property for the reasonable amount of time required to complete the repair.

2. Where the damage to personal property is such that it cannot be repaired and the property thereby restored to substantially its condition immediately before the damage occurred, or when the reasonable cost of repair exceeds the difference in market value of the property immediately before and immediately after the injury, the measure of damages is the lost market value plus the reasonable value of the loss of use of the property for the reasonable amount of time required to obtain a suitable replacement.

The reasonable value of the loss of use of personal property is generally the fair rental value of property of a like or similar nature or the amount actually paid for rental, whichever is less. *Husebo v. Ambrosia, Ltd.*, 204 Neb. 499, 283 N.W.2d 45 (1979). Where property used for commercial or business purposes cannot be rented, then loss of profits may establish the reasonable value of the loss of use. *Kunkel v. Cohagen*, 151 Neb. 774, 39 N.W.2d 609 (1949).

To the extent that any prior cases would limit the total compensation for damage to personal property to the fair market value of the property immediately before the injury, they are expressly overruled. The new rules shall apply to this case, any pending case in which error has been presented on the issue, and all cases tried after the date of filing of this opinion.

At the hearing on defendants' motion for new trial, plaintiffs requested and were permitted to amend the prayer of their petition from $62,807.77 to $63,172.58, the latter amount to correspond with the court's judgment. The difference in amount is $364.81 and clearly was done to conform to the proof at trial. A pleading may be amended in furtherance of justice, to conform to the proof, if the proposed amendment does not change substantially the claim or defense. The decision to allow or deny such amendment rests in the sound discretion of the court. Neb. Rev. Stat. § 25-852 (Reissue 1985); *West Town Homeowners Assn. v. Schneider*, 215 Neb. 905, 341 N.W.2d 588 (1983). The trial court acted well within its discretion in permitting the amendment.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

JOSEPHINE M. KNOELL ET AL., APPELLANTS, V. H. DAN HUFF AND NORTH KANSAS FINANCIAL CORPORATION, APPELLEES.

395 N.W.2d 749

Filed November 7, 1986. No. 85-232.

1. **Demurrer.** For the purpose of ruling on a demurrer, the court accepts well-pleaded facts in the petition, as distinguished from the conclusions alleged, as true.
2. **Appeal and Error.** Regarding questions of law, this court has an obligation to reach its conclusion independent from the conclusion reached by a trial court.
3. **Actions: Banks and Banking: Securities Regulation.** The Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 et seq. (Reissue 1983), is not the exclusive remedy under Nebraska law in cases involving the sale of securities.
4. **Statutes.** Where the same word is used repeatedly in the same act, unless the context requires otherwise, the word is to have the same meaning.
5. **Negligence.** In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury, a failure to discharge that duty, and injury resulting from the failure. The petition must allege these essential elements and the proof must support the allegations, or there can be no recovery.
6. **Pleadings.** The right to amend or correct a defect in a pleading is not without limitation.
7. **Fraud.** The elements of fraud are (1) a false representation of material fact, (2) knowledge that the representation was false or made in reckless disregard as to its truthfulness or falsity, (3) an intent to induce another to act, (4) a justifiable reliance on the representation, and (5) injury or damage resulting from such reliance.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed in part, and in part reversed.

David C. Huston of Paine & Huston, for appellants.

Rodney M. Confer of Knudsen, Berkheimer, Richardson & Endacott, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Plaintiffs-appellants, Josephine M. Knoell and nine others (investors), appeal from an order of the Lancaster County District Court which sustained a demurrer in favor of the defendants-appellees, H. Dan Huff (Huff), a resident of

Lancaster County, and North Kansas Financial Corporation (NKFC), a Nebraska corporation. The investors brought this suit to recover damages because of financial losses they sustained when the stock they had purchased in NKFC from Huff became worthless. The district court sustained the demurrer and dismissed the investors' petition. The court held that all five causes of action in the third amended petition were barred by the statute of limitations under the Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 et seq. (Reissue 1983), and that all five failed to state facts sufficient to constitute a cause of action. We affirm in part and in part reverse.

The facts in this case are set out in the investors' third amended petition. For the purpose of ruling on Huff's and NKFC's demurrer, we accept the well-pleaded facts in the petition, as distinguished from the conclusions alleged, as true. *Allen v. County of Lancaster*, 218 Neb. 163, 352 N.W.2d 883 (1984). The facts alleged in the petition are deemed admitted for the purpose of ruling on Huff's and NKFC's demurrer.

The investors are stockholders and debenture holders of NKFC. NKFC was formed for the purpose of acting as a holding company to own the stock of a Kansas corporation known as North Kansas Savings Association (NKSA). NKSA was a federally chartered savings and loan association with offices in Beloit and Phillipsburg, Kansas.

In September 1980 the investors were solicited by Huff and his agent, Tom Scheer, to invest in NKFC, which would in turn own a controlling interest in NKSA. During the solicitation, the investors were informed by Huff and Scheer that Huff had experience as a promoter in numerous bank acquisitions in the past and had been successful in arranging the ownership of financial institutions through holding companies. Huff and Scheer also represented to the investors that Huff would act as their agent and would (1) form a holding company to own the stock of NKSA and (2) gain federal home loan bank board approval of the transfer. The investors paid the purchase price for their securities at various times between September 1980 and January 1981. The money paid in was deposited in a repurchase, or "repo," account, earning interest. The total amount invested by all 10 investors was $266,500.

The petition shows that Huff, before soliciting the investors, acquired controlling interest in NKSA in January 1980. To finance the purchase of the NKSA stock, Huff made a downpayment of approximately $300,000 from funds borrowed by him from the National Bank of Commerce in Lincoln, Nebraska. Huff later negotiated a loan of $1.3 million from the Merchants Bank in Topeka, Kansas, to complete the financing. Huff used the funds solicited from the investors to repay part of the $300,000 loan from the National Bank of Commerce.

At the time Huff acquired the stock of NKSA, he was informed by the NKSA stockholders and employees that there was a lawsuit pending against NKSA in the district court of Geary County, Kansas, relating to the breach of a loan commitment.

The holding company (NKFC) was formed on January 5, 1982. At that time Huff assigned to NKFC all of the stock acquired by him in NKSA, representing 89.45 percent of the stock of NKSA. Each investor was issued between one-half and two debentures and 150 to 600 shares of stock in NKFC, depending upon the amount of investment.

On July 29, 1982, judgment was entered against NKSA in the Geary County, Kansas, lawsuit, in the amount of $1,495,944. Thereafter, the federal home loan bank board closed NKSA. By letter dated November 22, 1982, Huff informed the investors that the judgment against NKSA had precipitated the closing by the federal home loan bank board, that he had knowledge of the pending lawsuit at the time he acquired the NKSA stock, and that their investments should be considered worthless. At no time before November 22, 1982, did any of the investors have knowledge of the existence of the Geary County lawsuit pending against NKSA.

The investors filed their petition, setting out three causes of action, against Huff and NKFC on November 21, 1983, for damages incurred as a result of the securities becoming worthless. Huff and NKFC filed a motion to strike and to make the petition more definite and certain. This motion was sustained in part. An amended petition was filed. A second motion was sustained in part, and the investors filed a second

amended petition. Huff and NKFC demurred, and the district court sustained the demurrer on the ground that none of the counts in the petition stated a cause of action. The court again gave the investors additional time to file a further amended petition.

The investors filed their third amended petition on September 24, 1984, setting out five causes of action. Huff and NKFC again filed a demurrer on October 12, 1984, alleging that the causes of action in the petition were barred by the statute of limitations under the Securities Act of Nebraska, §§ 8-1101 et seq., and that the petition did not state sufficient facts to constitute a cause of action. The trial court sustained the demurrer and dismissed the investors' petition with prejudice.

The investors have assigned six errors, which may be consolidated into two: (1) That the court erred in determining that the "Nebraska Blue Sky Law" (now Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 to 8-1124 (Reissue 1983)) provides the exclusive remedy for those who sustain damages in the purchase of securities and that all of the investors' causes of action were barred by the statute of limitations in that act; and (2) That the court erred in determining that none of the causes of action stated facts sufficient to constitute a cause of action.

We first determine whether the trial court was correct in determining that the "exclusive remedy" to the investors was through §§ 8-1101 to 8-1124. Regarding questions of law, this court has an obligation to reach its conclusion independent from the conclusion reached by a trial court. *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

A review of the investors' third amended petition shows that all five causes of action are based upon the alleged misconduct of Huff surrounding the sale of stock in NKFC. As previously noted, the trial court determined that the exclusive remedy to the investors was through the Securities Act of Nebraska. The trial court also determined that the contract for the sale of the securities in NKFC "occurred no later than January, 1981." Section 8-1118(3) provides in part that "[n]o person may sue under this section more than two years after the contract of sale." Under the trial court's reasoning, the investors had until January 1983 to timely file their petition in order to pursue their

rights under the Securities Act of Nebraska. The investors filed their original petition on November 21, 1983.

In arguing their first assignment of error, the investors maintain that the Securities Act of Nebraska is not their exclusive remedy and that even if it is, the trial court incorrectly determined the time when the statute of limitations began to run.

The investors argue that their claims are based on negligence, breach of fiduciary duty, and misrepresentation (fraud)—all common-law actions which carry 4-year limitation periods under Neb. Rev. Stat. §§ 25-201 et seq. (Reissue 1985). The investors contend that they are entitled to bring their common-law action as opposed to only seeking a remedy under the Securities Act of Nebraska because "There is no express language in the [current] Blue Sky Law which excludes all other common law causes of action." Brief for Appellants at 19. The investors contend that statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the act compel it.

Huff and NKFC contend the trial court was correct in its determination that the Securities Act of Nebraska was the exclusive remedy in this case. They point to § 8-1124(1), which they contend "expressly precluded any civil suit to enforce preexisting common law remedies law [sic] after August 18, 1967." Brief for Appellees at 5. Section 8-1124(1) provides:

> Prior law shall exclusively govern all suits, actions, prosecutions, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before August 18, 1965, except that no civil suit or action may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when the cause of action accrued and in any event within two years after August 18, 1965.

Our review, however, of the history of this section and its earlier enactments leads us to the conclusion that the reference to "prior law" refers not to prior common law but, rather, to prior statutory law governing "blue sky" transactions.

Nebraska has had a "blue sky" law in one form or another since at least 1913. See 1913 Neb. Laws, ch. 199, p. 603. Section 13 of that act established a 1-year statute of limitations. The act provided in part: "[P]rovided, however, no action to rescind any contract of sale made in contravention of *the provisions of this act* shall be maintainable unless the same is instituted within one year." (Emphasis supplied.) It seems quite clear from the language of § 13 that one had an option. He or she could either maintain an action to rescind a contract of sale under the newly enacted "blue sky" law, so long as it was instituted within 1 year, or could bring any common-law action within the applicable statute of limitations then in existence for such action. Nothing is said in the law of 1913 about the act's being cumulative. Yet, it is quite clear from a reading of the act that such is the case.

In 1921 the "blue sky" laws were again amended. See 1921 Neb. Laws, ch. 308, p. 967. For the first time there appears language regarding the extent of one's liability. Section 28 specifically provides: "Nothing herein contained shall limit or diminish the liability of any person or company now imposed by law, or prevent the prosecution of any person or company violating any of the provisions of this Act for the violation of any other statute or of any other provision hereof." While one may argue that the reference to "law" in § 28 refers to the common law, reading the section in its entirety leads one to the conclusion that liability "imposed by law" refers to other statutory laws and does not in any manner attempt to either expand or diminish an individual's common-law liability.

This becomes even clearer when, in 1937, the Legislature adopted a comprehensive "blue sky" law. See 1937 Neb. Laws, ch. 195, p. 790. Section 38 of the 1937 act provides as follows: "The provisions of Sections 81-5419, 81-5428 and 81-5429, Compiled Statutes of Nebraska, 1929, shall be and remain in full force and effect and shall apply to all of the provisions of this Act the same as though they had been originally enacted herein." Comp. Stat. § 81-5429 (1929) is identical with § 28 of the 1921 act. The language of § 81-5429 was brought in its entirety into Neb. Rev. Stat. § 81-346 (1943).

It was not until 1965 that any attempt was made to limit

liability under "blue sky" laws. See 1965 Neb. Laws, ch. 549, p. 1762. Section 24(1) of that enactment provided:

> Prior law shall exclusively govern all suits, actions, prosecutions, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before the effective date of this act, except that no civil suit or action may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when the cause of action accrued and in any event within two years after the effective date of this act.

It seems clear to us that no attempt was being made by the Legislature to do away with common-law causes of action, but only to make it clear that a suit could not be brought under a prior "blue sky" act unless suit was commenced within 2 years after the effective date of the act. Prior to 1965 one could maintain an action under either the 1937 act or the pre-1937 acts without limitation. After 1965 one was required to bring an action under the pre-1965 law for causes of action accruing prior to the effective date of the act and, in any event, must do so within 2 years after August 18, 1965, or forever be precluded from maintaining such action. This is further made clear when one looks at § 8-1124(3), which reads: "Prior law shall apply in respect of any offer or sale made within one year after August 18, 1965, pursuant to an offering begun in good faith before its effective date on the basis of an exemption available under prior law." Obviously, there were no exemptions available under the common law, the common law having no application to either registration or exemption. Therefore, Huff's and NKFC's argument that the term "prior law" includes the common law as well as statutory "blue sky" law must fail. It is a long-recognized rule of statutory construction that where the same word is used repeatedly in the same act, unless the context requires otherwise, the word is to have the same meaning. See, *Seward County Rural Fire Protection Dist. v. County of Seward*, 156 Neb. 516, 56 N.W.2d 700 (1953); *Edgerton v. Hamilton County*, 150 Neb. 821, 36 N.W.2d 258 (1949). Section 8-1124(1) creates a transition period between prior statutory "blue sky" laws and current statutory "blue sky" laws. This transition period allowed causes of action arising out of facts

and circumstances prior to August 18, 1965, the effective date of the act, to be brought within its period of limitation, but in no event later than August 18, 1967. The statute, however, does not preclude common-law actions from being brought before their statutes of limitations have run.

We hold, therefore, that the language of § 8-1124(1) does not provide that the Securities Act of Nebraska is the exclusive remedy under state law in cases involving the sale of securities.

Having decided this issue, we must now determine if the trial court correctly determined that none of the allegations stated facts sufficient to state a cause of action. With respect to the first cause of action, the trial court ruled that no sufficient facts were alleged from which a conclusion can be drawn that Huff and NKFC were negligent and that the negligence was the proximate cause of investors' damages.

> "In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure.
>
> "The petition must allege these essential elements, and the proof must support the allegations, or there can be no recovery."

Ring v. Kruse, 158 Neb. 1, 6, 62 N.W.2d 279, 284 (1954).

Investors' third amended petition does allege the representation by Huff that he would act as investors' agent in handling their money, forming a holding company, and issuing stock and debentures. The petition further alleges that Huff breached his duty to investors by failing to inform them of the pending lawsuit, by failing to hold their funds in escrow, and by failing to consult with an attorney regarding the merits of the pending lawsuit. Finally, the petition alleged damages in the amount of $266,500 plus interest. The essential elements to constitute actionable negligence have been alleged, and the trial court was incorrect in dismissing investors' first cause of action.

The second cause of action, which alleges constructive fraud and the imposition of a trust, is one in equity. A constructive trust is a relationship, with respect to property, subjecting the

person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment. Each case involving the existence of a constructive trust is to be determined on the peculiar facts, circumstances, and conditions presented therein. *Ruppert v. Breault*, 222 Neb. 432, 384 N.W.2d 284 (1986). The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character. *Ford v. Jordan*, 220 Neb. 492, 370 N.W.2d 714 (1985). Accepting as true the facts alleged in the petition, the investors have alleged facts sufficient to state a cause of action. The trial court was incorrect in sustaining Huff's and NKFC's demurrer on this cause of action.

In their assignment of error concerning their third cause of action, the investors allege that the district court erred "in determining that the third cause of action did not state facts which were sufficient to constitute a cause of action under 15 U.S.C. § 77L(2) and that the cause was barred by the limitation of 15 U.S.C. § 77m." The investors have raised two issues in this assigned error; one being a statute of limitations issue and the other presenting a pleading issue. Both §§ 77*l*(2) and 77m are part of the Securities Act of 1933, 15 U.S.C. §§ 77a et seq. (1982), an act designed to protect investors by promoting full disclosure of information believed to be necessary to the making of informed investment decisions. Our authority to review and grant relief under the Securities Act of 1933 is set out in § 77v(a), which provides that state courts shall have jurisdiction of offenses and violations under the 1933 act concurrent with U.S. district courts. See, *First National City Bank New York v. Smith*, 531 P.2d 321 (Okla. 1975); *Greenfield v. Cheek*, 122 Ariz. 70, 593 P.2d 293 (1978), *aff'd* 122 Ariz. 57, 593 P.2d 280 (1979).

The investors' third cause of action is based upon alleged prospectus and interstate communications violations by Huff and NKFC under the 1933 act, pursuant to § 77*l*(2). The investors allege that the omission of "material fact" in this case is the nondisclosure of the Geary County, Kansas, lawsuit. In dismissing the investors' third cause of action, the trial court

determined that any relief to the investors under the 1933 act was barred by the statute of limitations of § 77m, which provides that any action under § 77*l*(2) must be brought within 1 year after the discovery of the untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence, but in no event later than 3 years after the sale. The 3-year limitation period acts as a complete bar, regardless of when discovery is made. *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301 (9th Cir. 1982); *Summer v. Land & Leisure, Inc.*, 664 F.2d 965 (5th Cir. 1981).

In deciding if the statute of limitations under § 77m has run, the issue, as framed by both parties, is whether or not the action was brought "more than three years after the sale." § 77m. The investors argue that there was no sale until after the formation of the holding company on January 5, 1982. For the reasons set out below, we do not agree. The contract begins to run after the contract of sale.

On its face, the third amended petition shows that 7 of the 10 investors, namely, Josephine Knoell, Susan Huston, Julius Kowalski, Gerald Siedband, Charles Newell, Ford Van Lines, and Vern Westberg, all paid for their investment units in September and October of 1980. Other courts have agreed with our holding above, that a "sale" under the Securities Act of 1933 occurs when an offer to purchase was accepted. See *Tirone v. Calderone-Curran Ranches, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 96,480 (W.D.N.Y. 1978). In this case the sale occurred when the investors accepted Huff's offer of sale by the payment of their purchase price for the investment units. Accordingly, the actions of the above-named investors are time barred by § 77m, since they did not bring this action until November 21, 1983, more than 3 years after the sale to them occurred.

The three remaining investors, Dale Herman, Lloyd Wheeler, and James Wheeler, paid for their investments in December 1980 and January 1981. The trial court was incorrect in finding that these investors were time barred by § 77m. However, in dismissing the third cause of action (as to all the investors), the trial court determined that the "third cause of action does not state facts sufficient to constitute a cause of action in that it contains no allegations sufficient to support a

recovery by plaintiffs [investors]."

Compliance with § 77m is a substantive rather than a procedural matter, and a plaintiff must affirmatively allege facts indicating his action has been brought timely when seeking relief under the 1933 act. *Dahl v. Gardner*, 583 F. Supp. 1262 (D. Utah 1984). The third amended petition did not set out any allegations as to the time and circumstances of discovery of the alleged fraud, any allegations as to why the alleged fraud was not discovered sooner, nor any allegations as to what diligence the investors used in making discovery. *Brick v. Dominion Mortg. & Rlty. Trust*, 442 F. Supp. 283 (W.D.N.Y. 1977). The Wheelers and Herman have not included allegations as to their diligence in attempting to discover the alleged fraud or any reason why they did not discover it within 1 year of the sales to them in December 1980 and January 1981.

Ordinarily, a plaintiff is allowed to amend his petition to attempt to plead sufficient facts to constitute a cause of action. However, in this case absolute dismissal is appropriate. The investors have pled and repled this cause of action in essentially the same way four different times. In the initial petition and in the third amended petition, they pled facts concerning an alleged violation of § 77*l*(2) in the same way. Neb. Rev. Stat. § 25-854 (Reissue 1985) provides that if a demurrer be sustained, the adverse party may amend his pleading "if the defect can be remedied by way of amendment." That right to amend, however, is not without limitation. In *Suzuki v. Gateway Realty*, 207 Neb. 562, 565, 299 N.W.2d 762, 765-66 (1980), we stated:

> This section of the statute has been held by this court on several occasions to not provide an absolute right of amendment. See, *Evans v. Metropolitan Utilities Dist.*, 184 Neb. 172, 166 N.W.2d 411 (1969); *Weiner v. Morgan*, 175 Neb. 656, 122 N.W.2d 871 (1963); *Coverdale & Colpitts v. Dakota County*, 144 Neb. 166, 12 N.W.2d 764 (1944). This court has previously stated that, before error can be predicated upon the refusal of the court to permit an amendment to a petition after demurrer thereto is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of

discretion. *Coverdale & Colpitts v. Dakota County; Weiner v. Morgan.*

See, also, *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984). The trial court did not err in not ordering a further right to amend the investors' petition with respect to the third cause of action.

The district court held that investors' fourth cause of action did not state facts sufficient to state a cause of action. We agree with the trial court's determination. The pleadings constituting this cause of action merely restate facts contained elsewhere in the third amended petition. These facts are duplicative and no separate theory of recovery is alleged. We cannot discern a theory of recovery and so affirm the sustaining of Huff's and NKFC's demurrer with respect to this cause of action.

The fifth cause of action alleges fraud, and investors assign as error the court's determination that there were insufficient facts from which the necessary intent for fraud could be inferred. Investors alleged fraudulent misrepresentations and omissions and damages. The elements of fraud are (1) a false representation of material fact, (2) knowledge that the representation was false or made in reckless disregard as to its truthfulness or falsity, (3) an intent to induce another to act, (4) a justifiable reliance on the representation, and (5) injury or damage resulting from such reliance. *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.W.2d 732 (1985). The essential elements to constitute fraud have been alleged, and the trial court was incorrect in dismissing investors' fifth cause of action.

For the reasons set forth above, the judgment of the trial court is affirmed in part and reversed in part.

AFFIRMED IN PART, AND
IN PART REVERSED.

GRANT, J., dissenting.

I dissent from so much of the majority opinion that holds, in effect, that the 2-year statute of limitations of Neb. Rev. Stat. § 8-1118(3) (Reissue 1983) does not control the disposition of plaintiffs' action in this case. Section 8-1124(1) provides:

> Prior law shall exclusively govern all suits, actions, prosecutions, or proceedings which are pending or may be

> initiated on the basis of facts or circumstances occurring before August 18, 1965, except that no civil suit or action may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when the cause of action accrued and in any event within two years after August 18, 1965.

This section created a transition period between "prior law" and the Securities Act of Nebraska (Neb. Rev. Stat. §§ 8-1101 to 8-1124 (Reissue 1983)). This period allowed causes of action arising out of facts and circumstances prior to August 18, 1965, to be brought within the period of limitation applicable to those actions, but in no event later than August 18, 1967. These actions included common-law actions, such as fraud and negligence. In enacting §§ 8-1101 et seq., the Legislature knew that common-law causes of action had limitation periods extending beyond August 18, 1967. Section 8-1124(1) became law on August 18, 1965. The language of § 8-1124(1) plainly states that the Legislature intended that all actions that arose under "prior law" concerning securities had to be brought within 2 years after August 18, 1965. In requiring all "prior law" actions to be brought within this time, the Legislature made it clear that the Securities Act of Nebraska provided the controlling statute of limitations in securities cases arising after August 18, 1965, no matter what the theory of recovery.

"Prior law" included the Blue-Sky Law, Neb. Rev. Stat. §§ 81-302 to 81-346 (Reissue 1958). Section 81-346 of the Blue-Sky Law preserved preexisting common-law remedies in providing: "Nothing contained in sections 81-302 to 81-345 shall limit or diminish the liability of any person or company now imposed by law, or prevent the prosecution of any person or company violating any of the provisions of said sections for the violation of any other statute . . . ." The Blue-Sky Law, including § 81-346, was repealed by 1965 Neb. Laws, ch. 549, § 25, p. 1798. The Securities Act of Nebraska was enacted by 1965 Neb. Laws, ch. 549, §§ 1 to 24, pp. 1762-98. It appears to me that in repealing § 81-346, the Legislature specifically determined that the newly enacted Securities Act of Nebraska would be controlling as to all security transactions.

I note also that the Securities Act of Nebraska, as adopted,

was modeled substantially after the Uniform Securities Act, 7B U.L.A. 509 et seq. (1985). Specifically, § 8-1118 is almost a complete adopting by the Nebraska Legislature of § 410 of the Uniform Securities Act. A key provision of the Uniform Securities Act, § 410(h), however, was not adopted. That section provided: "The rights and remedies provided by this act are *in addition to* any other rights or remedies that may exist at law or in equity, but this act does not create any cause of action not specified in this section or section 202(e)." (Emphasis supplied.) By refusing to enact the provisions of § 410(h) of the Uniform Securities Act, the Legislature made a conscious decision that the Securities Act of Nebraska controlled all actions concerning securities. It appears to me that if the Legislature desired to preserve other general statutes of limitations under the new Securities Act of Nebraska, then either the Legislature would not have repealed § 81-346 or it would have enacted a provision similar to § 410(h) of the Uniform Securities Act.

I believe, therefore, that the language of § 8-1118(3) sets out the applicable statute of limitations of 2 years under Nebraska law in cases involving the sale of securities. Other jurisdictions have reached the same result. See, *O'Hara v. Kovens*, 625 F.2d 15 (4th Cir. 1980); *Dehler v. Setliff*, 143 Ga. App. 430, 238 S.E.2d 723 (1977); *Diamond v. Lamotte*, 709 F.2d 1419 (11th Cir. 1983); *Friedlander v. Troutman, Sanders, Lockerman*, 788 F.2d 1500 (11th Cir. 1986).

Plaintiffs' action was not brought within the 2-year period. I would affirm the judgment of the trial court dismissing plaintiffs' action.

BOSLAUGH and HASTINGS, JJ., join in this dissent.

CHILES, HEIDER & CO., INC., APPELLEE, V. PAWNEE MEADOWS, INC., A NEBRASKA CORPORATION, APPELLANT, RICHARD WOZNIAK ET AL., APPELLEES.

396 N.W.2d 111

Filed November 7, 1986. No. 85-450.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Affirmed.

August P. Ross and Annette E. Mason of Ross & Mason, P.C., for appellant.

Michael G. Lessmann and Thomas E. Johnson of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee Chiles, Heider & Co.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is the second appearance of this case in this court. The facts of the case are set out in detail in our earlier opinion, *Chiles, Heider & Co. v. Pawnee Meadows*, 217 Neb. 315, 350 N.W.2d 1 (1984) (*Chiles, Heider I*), and will not be repeated herein except to the extent necessary to make this opinion clear.

For the purpose of developing certain property described as Lots 1 to 58, inclusive, in Pawnee Meadows, a subdivision in Saunders County, Nebraska, Sanitary and Improvement District No. 4 of Saunders County, Nebraska, was created pursuant to the provisions of Neb. Rev. Stat. §§ 31-701 et seq. (Reissue 1978). In August of 1974 Chiles, Heider and S.I.D. No. 4 entered into a letter agreement in which Chiles, Heider agreed to purchase certain construction fund warrants issued by S.I.D. No. 4. As a part of that agreement to purchase, Chiles, Heider and Pawnee Meadows, Inc., entered into a separate agreement in which Pawnee Meadows agreed that

> [a]t any time on or after a date four (4) years after the date of the first warrant issued by SID and purchased by Chiles, Heider, upon request of Chiles Heider, [Pawnee Meadows] will purchase from Chiles, Heider, or any other holder of warrants issued by SID, all unpaid warrants

issued by SID requested by Chiles, Heider to be so purchased.

To secure its performance Pawnee Meadows executed and delivered to Chiles, Heider a mortgage covering the property located within S.I.D. No. 4 and owned by Pawnee Meadows. It is significant for an understanding of the problem presented by this appeal to recognize, as we determined in *Chiles, Heider I*, that the agreement between Pawnee Meadows and Chiles, Heider was not a guaranty of S.I.D.'s obligation on the warrants but, rather, was a separate and independent agreement entered into between Pawnee Meadows and Chiles, Heider. Further, it is important to recognize that the mortgage executed by Pawnee Meadows and given to Chiles, Heider was not to secure the payment of the warrants issued by S.I.D. No. 4 but, rather, was to secure the agreement of Pawnee Meadows to repurchase the warrants, under certain conditions, upon request by Chiles, Heider.

At a time 4 years after the date that the first warrant was issued by S.I.D. and purchased by Chiles, Heider, the latter requested Pawnee Meadows to purchase all of the warrants. Pawnee Meadows refused to do so, and Chiles, Heider instituted foreclosure proceedings. Following trial, a decree of foreclosure was entered. It was that decree which we reviewed in *Chiles, Heider I*. Essentially, we affirmed all that the district court had ordered, except that we required Chiles, Heider to tender to the clerk of the district court the warrants which Chiles, Heider desired Pawnee Meadows to purchase. Chiles, Heider did so, and when Pawnee Meadows failed to purchase the warrants within the time allowed, the order of foreclosure was carried out. At the sale, Chiles, Heider purchased the property for the sum of $44,672.93, far less than the principal amount due and owing on the warrants. The district court subsequently entered an order confirming the sale and directing that the unpurchased warrants, then in the possession of the clerk of the district court, be returned to Chiles, Heider. Pawnee Meadows has once again appealed to this court, contending that the district court erred (1) in directing the distribution of the proceeds by returning to Chiles, Heider all of the warrants and not requiring the payment of the bid for

Pawnee Meadows' benefit or (2) in not directing that warrants, to the extent that the same could be purchased by the bid, be delivered to Pawnee Meadows.

While generally we disagree with the arguments presented by Pawnee Meadows, we are in complete accord with the statement contained in Pawnee Meadows' brief that "this is not the usual mortgage foreclosure where there is a debt due and owing and a mortgage given in security for said debt." Brief for Appellant at 6. It is, of course, the unusual nature of the action which creates some of the difficulty. We believe, however, that when the situation is properly viewed, the order of the district court was, in all respects, correct and should be affirmed.

Turning first to Pawnee Meadows' second assignment of error, we have already disposed of that argument. In *Chiles, Heider I*, we held that the obligation imposed upon Pawnee Meadows to repurchase the warrants was not a guaranty but, rather, an independent obligation assumed by Pawnee Meadows. The mortgage given by Pawnee Meadows was to secure its performance to purchase the warrants, and not to satisfy the S.I.D.'s obligation to pay the warrants. Furthermore, *Chiles, Heider I* clearly held that Pawnee Meadows was not entitled to purchase less than all of the warrants tendered by Chiles, Heider.

To now hold that Pawnee Meadows is entitled to receive physical possession of part of the warrants simply flies in the face of what we have already determined. The question of how the money is to be allocated by Chiles, Heider has not been determined by this action and undoubtedly is a matter between Chiles, Heider and its warrant holders. It cannot be decided in this action, where the warrant holders were neither given notice that such matter would be resolved nor made parties to the action. The assignment of error is simply without merit and must be overruled.

To the same extent, Pawnee Meadows' first assignment of error must be overruled. While the assignment of error is unclear and the argument made by appellant in support of the assignment does little to clear up the confusion, we assume appellant believes that Chiles, Heider should have been required to tender a check in the amount of $44,672.93. We are

simply unable to comprehend how the formality of requiring Chiles, Heider to execute and deliver a check to the clerk of the district court in the amount of $44,672.93, only to receive back from the clerk of the district court a check in the amount of $44,672.93 is necessary in order to somehow give validity to the transaction. Where the individual who is to receive the proceeds is the same individual who is required to pay in the proceeds, a memo entry without a check seems to this court to be sufficient. How Pawnee Meadows would realize a greater benefit if the above formality were followed is simply beyond comprehension. The mortgage given by Pawnee Meadows was not to secure the payment of the warrants but, rather, was to secure the performance by Pawnee Meadows to purchase the warrants. This it failed to do, and for that reason the property was foreclosed. There is nothing more for it to receive by way of benefit. Nor is it entitled to possession of the warrants. Those warrants are still outstanding obligations of the S.I.D. They are not an obligation of Pawnee Meadows. Therefore, the unpaid warrant holders are entitled to have the warrants returned to them. While we did not in *Chiles, Heider I* direct what should be done with the warrants in the event that Pawnee Meadows did not purchase all of them, it seems obvious that the district court, in entering its order confirming the sale, was required to order their return. As noted in 5 Am. Jur. 2d *Appeal and Error* § 992 at 419-21 (1962):

> On remand, the trial court may consider and decide any matters left open by the appellate court and is free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision. . . . The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein. The mandate is to be interpreted according to the subject matter and, if possible, in a manner to promote justice.

We believe that is precisely what the district court did in the instant case. The district court did not ignore our mandate in *Chiles, Heider I*, nor expand it, but, rather, did precisely what we ordered it to do, and then proceeded to take such further

necessary action as required by our opinion to conclude the matter following the foreclosure sale. The district court's order was not a modification of the judgment, as was contended by Pawnee Meadows. We are unable to find any error in what was done by the district court, and for that reason the actions taken by the district court are in all respects affirmed.

AFFIRMED.

CAPORALE, J., not participating.

IN RE INTEREST OF J.N.V., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. S.V., APPELLANT.
395 N.W.2d 758

Filed November 7, 1986. No. 85-996.

Parental Rights. One need not have physical possession of a child to demonstrate the existence of the neglect contemplated by Neb. Rev. Stat. § 43-292(2) (Reissue 1984), which provides for the termination of parental rights when the parents have "substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection."

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Robert C. McGowan, Jr., for appellant.

Donald L. Knowles, Douglas County Attorney, and Elizabeth G. Crnkovich, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The separate juvenile court terminated the mother's parental rights to her now 2-year-old son, J.N.V. By her assignments of error the mother questions the sufficiency of the evidence to establish that she "substantially and continuously or repeatedly neglected" her son or that she refused to give him "necessary parental care and protection" as contemplated by Neb. Rev. Stat. § 43-292(2) (Reissue 1984). We affirm.

On July 19, 1984, the mother, without aid, gave birth to her son on the floor of her kitchen. At the time, the mother was sharing her apartment with her paramour and 7-year-old daughter. While the paramour lay sleeping on the living room couch during the birth, the daughter ran to a neighbor's home to seek assistance. The attending physician at the hospital to which the mother and her son were admitted became concerned about the sanitary conditions at the mother's apartment because both she and her daughter had come to the hospital with head lice. As a consequence, the hospital contacted the Child Protective Services office. A representative of that office inspected the apartment on July 24, 1984, and found there was no clothing or crib for the newly born son, nor was there any food for anyone else. The mother had no plans to provide for her son until she was to receive her Aid to Dependent Children check on the 1st of August. The mother was instructed by the Child Protective Services representative that before her son, who was then still hospitalized, could be returned to her, the apartment needed to be cleaned; a crib, diapers, and food provided; and that she and her daughter needed to get rid of their head lice. The mother was also provided with some items and with information to help her obtain other necessities.

As of August 13, the mother had still made no preparations for her son, who had been placed in temporary foster care. By this time her paramour had left the apartment, had taken the daughter with him, and had left the mother without any funds. The mother was apparently agitated and repeatedly stated to a visiting nurse, who was assisting the mother to prepare for her son's return, that "I don't know what to do, I don't know what to do." Concluding that the mother could not manage daily living by herself, the visiting nurse referred her to Adult Protective Services. The mother was then moved to the Booth Salvation Army Residence.

The mother expressed a desire for both of her children to be returned to her, and attempts to secure necessities for the son by nurses, the staff at Booth hospital, and others continued. With the help of her caseworkers the mother obtained Social Security and medicaid payments. However, the mother had become "immobilized" and was incapable of doing anything. Her

Adult Protective Services caseworker testified that the mother could not make decisions or any plans for her future or for her son.

In September this caseworker thought it necessary to commit the mother to the Community Mental Health Center at the Douglas County Hospital; however, the mother ultimately entered the hospital voluntarily. In October she was moved to a halfway house in Omaha. During this period, the mother visited her son at the Nebraska Children's Home until November 1984, when the home lost contact with the mother.

In March or April of 1985 the mother returned to the care of the halfway house. It is not clear exactly how long the mother's whereabouts were unknown or where the mother had been living after she returned from her disappearance, what type of therapy she was receiving, or what type of arrangements were being made to prepare her to raise her son. It does appear, however, that once her whereabouts again became known, she resumed visits with her son.

The evidence further reflects that the mother had considered the possibility of the son's foster parents adopting him. She eventually signed a relinquishment for adoption, but later withdrew it because of a disagreement as to what rights she would have with respect to her son after adoption.

The mother was diagnosed as a paranoid schizophrenic whose personal grooming had deteriorated to the point that as of October 25, 1985, 6 days before the hearing resulting in the judgment appealed from, her body odor was offensive; she did not respond to efforts to communicate with her, either individually or in groups; and she exhibited intense anger, was constantly nervous and agitated, remained entirely by herself, and threatened suicide. Long-term hospitalization was recommended, as her condition was not expected to improve in the near future. According to her attorney, at the time of the hearing she was involuntarily committed to the board of mental health. The evidence further revealed that there has been no bonding between the mother and her son, and the mother becomes anxious when performing child care duties alone.

The operative petition alleges that the son comes within the meaning of § 43-292(2). That statute provides for the

termination of parental rights when such action is in the juvenile's best interests and it appears by the evidence that "[t]he parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection."

The mother's argument is not that she is fit to be a mother but, rather, that the evidence does not establish the ground pled as the basis for terminating her parental rights. More specifically, she contends that as she at no time had physical possession of her son, she could not have neglected him and refused to give him the necessary parental care and protection contemplated by § 43-292(2).

It is true that the State might have elected to assert as a ground for terminating her rights the mother's inability to discharge her parental responsibilities because of her long-term mental illness or deficiency, § 43-292(5), or that more careful advocacy on the part of the State would have suggested that it amend its pleading by adding § 43-292(5) as a ground for the judgment it sought. However, the law on the issue of neglect is not as the mother perceives it to be.

One need not have physical possession of a child to demonstrate the existence of the neglect contemplated by § 43-292(2). In the case of *In re Interest of C.L.F.*, 216 Neb. 631, 344 N.W.2d 674 (1984), the child was born to a mother who abused drugs. The child was at all relevant times retained in the custody of the State because it was alleged that the mother would not be able to care for the child upon her release from the hospital. A rehabilitation program was established; however, the mother remained subject to the influence of drugs, did not attend all of her therapy sessions, disappeared for a period of time, and did not attend the court hearings. This court affirmed the termination of the mother's rights to the child, under § 43-292(2), for neglect.

Similarly, in *In re Interest of Wagner and Russell*, 209 Neb. 33, 305 N.W.2d 900 (1981), the parental rights of the natural father of one of the children involved were terminated. The father had never lived with or married the mother. The evidence showed that in the 3 years prior to his incarceration, the father gave no support to the child and made only seven or eight visits.

The court stated that the evidence was sufficient to show neglect and incapacity to carry out his parental responsibilities, notwithstanding the fact that the mother wanted no help from him.

In a situation not dissimilar to that presented by this case, it was held evidence that the mother suffered from chronic undifferentiated schizophrenia, as the result of which she was and would likely remain unable to care for her children, was sufficient to support a finding that her infant son was a "neglected child." *Department of Social Servs., St. Lawrence County v Joan R.*, 61 A.D.2d 1108, 403 N.Y.S.2d 368 (1978).

A parent may as surely neglect a child of whom she does not have possession by failing to put herself in a position to acquire possession as by not properly caring for a child of whom she does have possession. It would have been hazardous in the extreme to have entrusted the son's fragile life to his mother's possession, when she failed to put herself in a position to properly care for him. While it might have been kinder in these sad and unfortunate circumstances for the State to have proceeded under § 43-292(5), it was not required to do so.

We conclude from our de novo review of the record that the evidence clearly and convincingly establishes the son was substantially and continuously neglected, that the mother refused to give her son necessary parental care and protection, and that the son's best interests require that the mother's parental rights in and to him be terminated.

The judgment of the separate juvenile court, being correct, is affirmed.

AFFIRMED.

CAPORALE, J., dissenting.

While I agree that the mother's parental rights in and to her son probably must be terminated, I must nonetheless regretfully dissent. I do so because the State simply chose to ignore the fact it was dealing with a mentally ill mother who, through no fault of her own, could not care for her son, and treated her as if she were of sound mind and had consciously elected to neglect her parental responsibilities. Accordingly, I would reverse the judgment of the court below, with the instruction that the son be kept in foster care until the State

performs its task of proving its right to terminate the mother's parental rights in the manner prescribed by law.

Neb. Rev. Stat. § 43-292 (Reissue 1984) provides that the juvenile court may terminate parental rights on a variety of grounds, including when:

> (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection;
>
> . . . .
>
> (5) The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period.

The statute further provides that when "termination of the parent-juvenile relationship is sought under subdivision (5) of this section, the court shall appoint a guardian ad litem for the alleged incompetent parent."

Thus, while the majority opinion makes no distinction between a mentally ill parent and one who is not, § 43-292 does make such a distinction.

There is good reason for making such a distinction. The notion of neglect contemplates the existence, among other things, of intelligence, judgment, and reason, rendering one capable of recognizing and adhering to a required standard of care. It is for that reason that in negligence actions we require a child to exercise only that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. *Gadeken v. Langhorst*, 193 Neb. 299, 226 N.W.2d 632 (1975).

Therefore, under the State's pleading, the real question in this case is not whether a mother can neglect a son whom she does not have in her possession but whether the mother had the capacity to neglect her son. The evidence clearly establishes she did not have such capacity and that she therefore does not come within the purview of § 43-292(2).

The evidence establishes, however, that she may come within the purview of § 43-292(5). The difficulty is that the State did not give the mother notice, through a guardian ad litem, that it

was her mental ability to be a parent which was at issue. In *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983), we noted, in connection with a statute empowering a court to appoint a guardian ad litem for a minor seeking an abortion, that the duties of a guardian ad litem are not coextensive with those of an attorney representing the minor. We observed that the guardian ad litem was to determine the best interests of the minor without reference to the minor's wishes.

The majority opinion ignores a statutory requirement and deprives a mentally ill mother of the valuable right to have her interests protected by a guardian ad litem. Proper notice is more than a matter of form, it is a constitutional requirement which is met only when one is advised of the matters to be considered in a manner which is fair in view of the circumstances and conditions existent at the time. *Black v. Black*, 223 Neb. 203, 388 N.W.2d 815 (1986). It is fundamentally unfair to tell a mother it is the neglect of her son which is at issue and then try her for lacking the mental capacity to carry out her parental responsibilities. See *Tuch v. Tuch*, 210 Neb. 601, 316 N.W.2d 304 (1982).

The majority's opinion, although expedient, is, in my view, legally incorrect.

KRIVOSHA, C.J., and SHANAHAN, J., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. ROBERT E. WILLIAMS, APPELLANT.

396 N.W.2d 114

Filed November 7, 1986. No. 86-016.

1. **Postconviction: Trial: Evidence: Witnesses.** In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985) for postconviction relief, the trial judge, as the "trier of fact," resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony.
2. **Postconviction: Appeal and Error.** In an appeal involving a proceeding for

postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.

3. **Constitutional Law: Right to Counsel: Effectiveness of Counsel.** As a result of Neb. Const. art. I, § 11, and U.S. Const. amend. VI, the right to counsel is the right to effective assistance of counsel. For effective assistance of counsel a defendant is constitutionally entitled to a lawyer's representation free from conflicting interests.
4. **Criminal Law: Effectiveness of Counsel.** To sustain a claim of ineffective assistance of counsel and obtain reversal of a criminal judgment, a defendant must show (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.
5. **Effectiveness of Counsel: Words and Phrases.** In cases of alleged ineffective assistance of counsel, prejudice has been characterized as a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
6. **Constitutional Law: Effectiveness of Counsel: Presumptions: Conflict of Interest.** There is a presumption of prejudice involving a defendant's constitutional right to effective assistance of counsel when a defendant demonstrates (1) counsel actively represented conflicting interests and (2) an actual conflict of interest adversely affected performance by the defendant's lawyer. Such conflicts of interest must be shown to have resulted in counsel's conduct detrimental to the defense.
7. **Rules of Evidence: Witnesses.** The credibility of a witness may be attacked by any party, including the party calling him. Neb. Evid. R. 607 (Neb. Rev. Stat. § 27-607 (Reissue 1985)).
8. **Rules of Evidence: Trial: Prior Statements: Hearsay: Witnesses: Perjury.** A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the witness' testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)).
9. **Rules of Evidence: Hearsay: Impeachment: Prior Statements: Evidence.** What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Neb. Evid. R. 801(4)(a)(i) are satisfied. Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985).
10. **Rules of Evidence: Witnesses: Prior Statements: Evidence.** Subject to the exception specified in Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)), a witness' inconsistent statement may be admissible evidence to aid the jury in evaluating that witness' credibility, but a witness' inconsistent statement is not substantive evidence of the matter asserted unless such statement is otherwise admissible under the Nebraska Evidence Rules.
11. **Witnesses: Juries.** Witness credibility and the weight to be given a witness' testimony are matters for evaluation and determination by the jury.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Patrick W. Healey and Douglas L. Kluender, for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Robert E. Williams appeals the judgment of the district court for Lancaster County, which denied postconviction relief to Williams, see Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985), on Williams' claim of ineffective assistance of counsel based on his lawyers' alleged conflict of interest. We affirm.

In an evidentiary hearing, as a bench trial provided by §§ 29-3001 et seq. for postconviction relief, the trial judge, as the "trier of fact," resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony. Cf. *State v. Craig*, 219 Neb. 70, 80, 361 N.W.2d 206, 214 (1985) ("In a bench trial of a criminal case, the court, as the 'trier of fact,' is the sole judge of the credibility of witnesses and the weight to be given to their testimony"). In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous. *State v. Pearson*, 220 Neb. 183, 368 N.W.2d 804 (1985).

As reported in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), in a 1978 trial a jury found Williams guilty of the first degree murders of Patricia A. McGarry and Catherine M. Brooks, notwithstanding Williams' defense of insanity. The jury also found Williams guilty of sexually assaulting one of the victims. Two psychiatrists for the State testified that Williams was not insane at the time of the murders. For the defense, one psychiatrist "could not say [Williams] did not know that what he was doing was wrong," while a second psychiatrist testified Williams "would know his actions were wrong only if he took time to think." 205 Neb. at 63, 287 N.W.2d at 23. Williams' ex-wife, Merrilee, was not a witness in the murder trial. A

three-judge panel sentenced Williams to death for the murders. Williams' defense was conducted by the Lancaster County public defender's office. This court affirmed Williams' conviction and sentence of death.

In *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984), we affirmed the judgment of the district court, denying an evidentiary hearing on Williams' first motion for postconviction relief. The Lancaster County public defender's office represented Williams in that first hearing for postconviction relief.

Williams, through court-appointed counsel in place of the public defender's office, then filed a second motion for postconviction relief, claiming his trial counsel's conflict of interest was a violation of Williams' constitutional right to effective assistance of counsel. Paul Conley, a member of the public defender's office at the time of Williams' trial for the murders, had represented Williams' wife, Merrilee, in proceedings for dissolution of her marriage with Robert Williams. As evidence for the murder trial, the public defender's office did not seek testimony from Merrilee, namely, that Robert Williams was insane at the time of the murders, evidence which Williams characterized as "critical" to presentation of his insanity defense. In view of *State v. Myers*, 205 Neb. 867, 869, 290 N.W.2d 660, 661 (1980) ("a nonexpert with an intimate personal acquaintance may be allowed to testify as to the sanity or insanity of a defendant"), we ordered an evidentiary hearing "as an opportunity for Williams to establish his allegation that a conflict of interest denied effective assistance of counsel." *State v. Williams*, 218 Neb. 618, 622, 358 N.W.2d 195, 198 (1984).

On October 9, 1985, Williams' lawyer took the videotape deposition of Frances Forget, formerly Merrilee Williams, who testified about her marriage with Robert Williams and postmarital contact with Williams. During that marriage, there were a "number of times" when Merrilee received medical treatment or was admitted to a hospital on account of beatings by Williams. Conduct of such nature persisted until 1976, when Williams physically abused Merrilee and caused her to miscarry. In the spring of 1977 Merrilee petitioned for

dissolution of her marriage with Williams. A decree of dissolution was entered on August 3, 1977. On the morning of August 5 Williams "kidnapped" Merrilee in her employer's parking lot and drove her to a Lincoln park, where, after slashing Merrilee's forehead with a knife and threatening to "ram" the knife in her ear, Williams "raped" Merrilee. Later, on August 5, Williams took Merrilee to a hospital emergency room for treatment of knife wounds which she had sustained during the sexual assault in the park. Police were summoned and took Williams into custody. Williams was released on August 10. The murders of McGarry and Brooks occurred on August 11.

For approximately 1 week after the murders, Merrilee stayed with a psychiatric social worker, Sheralyn Cox. At the suggestion of personnel at a Lincoln "rape crisis clinic," Merrilee, in the company of Sheralyn Cox, departed for California. Referring to the time of the murders on August 11, Merrilee testified she did not believe Williams was "crazy" and "would not say he was crazy," but also testified she did not know whether she had told Sheralyn Cox that Williams was "crazy."

At the second postconviction hearing, Sheralyn Cox testified that Merrilee had "described [Williams] as crazy" and, after the murders of McGarry and Brooks, had made numerous comments "to the effect that [Merrilee] believed her husband to be crazy."

Thomas Hagel, formerly an attorney in the Lancaster County public defender's office and one of Williams' counsel for the murder trial, testified "nobody knew how to get ahold" of Merrilee, whose family would not "even talk" to Hagel, and further testified that he could not recall asking Conley about communications from Merrilee or her whereabouts. Hagel did not confer with Conley about Williams' defense. Conley had "absolutely no involvement" in preparation or trial of Williams' case. In a conference with Hagel shortly after the murder charges were filed, Williams mentioned his "bad feelings" toward Conley on account of the divorce proceedings, but wanted the public defender's office to "stay on the case" and was "adamant" about continued representation by the

public defender's office. The record does not reflect or indicate that any aspect or conduct of Williams' defense would have differed from that contemplated, actuated, or presented by trial counsel if Merrilee had been a witness at the murder trial.

Upon conclusion of the evidentiary hearing the district court concluded that Williams had

> failed to prove that he was denied his Sixth Amendment right to effective assistance of counsel in that:
>
> a. He has failed to show by any credible evidence that an actual conflict of interest existed.
>
> b. He has also failed to show any adverse effect on the performance of his attorneys.

The district court denied postconviction relief to Williams, who appeals claiming ineffective assistance of counsel on account of an actual conflict of interest which adversely affected his trial counsel's performance in Williams' defense to the murder charges.

As a result of Neb. Const. art. I, § 11, and U.S. Const. amend. VI, the right to counsel is the right to effective assistance of counsel. See, *State v. Pearson*, 220 Neb. 183, 368 N.W.2d 804 (1985); *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). For effective assistance of counsel a defendant is constitutionally entitled to a lawyer's representation free from conflicting interests. *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984).

> [A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. [Citation omitted.] But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. [Citation omitted.]
>
> . . . We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

Cuyler v. Sullivan, 446 U.S. 335, 349-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). See, also, *State v. Turner, supra*.

The U.S. Supreme Court stated in *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984):

> The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. [Citations omitted.]
>
> Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. See *Strickland v. Washington, post*, at 693-696 [citations omitted].

466 U.S. at 659 nn.25, 26.

After issuing *United States v. Cronic, supra,* but on the same day, the U.S. Supreme Court issued *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In reference to a claim of ineffective assistance of counsel, the Court in *Strickland* characterized "prejudice" as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," 466 U.S. at 694, and enunciated a test to determine whether counsel's assistance was "so defective as to require reversal of a conviction":

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687.

This court has adopted the *Strickland* test, that is, counsel's

deficient performance causing prejudice to the defense, to determine whether a criminal judgment against a defendant must be overturned as the result of ineffective assistance of counsel. See *State v. Pearson, supra.*

In *Strickland v. Washington, supra*, the Court discussed a "per se rule of prejudice" and a "rule of presumed prejudice":

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States v. Cronic, ante*, at 659, and n. 25. Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost. *Ante*, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.
>
> One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan*, 446 U. S., at 345-350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, *e. g.*, Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan, supra*, at 350, 348

(footnote omitted).

Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

As indicated in *Strickland v. Washington, supra*, a conflict of interest, per se, does not annihilate or frustrate a defendant's constitutional right to effective assistance of counsel, necessitating reversal of a judgment in a criminal case. However, there is a presumption of prejudice involving a defendant's constitutional right to effective assistance of counsel when a defendant demonstrates (1) counsel actively represented conflicting interests and (2) an actual conflict of interest adversely affected performance by the defendant's lawyer. Such conflicts of interest must be shown to have resulted in counsel's conduct detrimental to the defense.

Regarding prejudice on account of ineffective assistance of counsel, *Strickland* contains the following observation by the Court:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Id. at 697.

Putting aside the question whether an actual conflict of interest exists in the case before us, and following the suggestion in *Strickland*, we dispose of Williams' appeal on the basis of presence or absence of prejudice.

Williams argues that "the testimony of Forget at the time of trial would have been more helpful than the testimony given immediately prior to the evidentiary hearing." Brief for Appellant at 6. However, we reach the same conclusion as that of the district court regarding Merrilee Williams (Frances Forget) had she been a defense witness at Williams' trial for the murders. As shown by the record from the standpoint of reasonable and practical probability, Merrilee would have expressed an opinion that Williams was not "crazy" or was sane at the time of the murders. As a likely litotes, that testimony from Merrilee would not have been helpful to Williams' attempted defense of insanity. Implicit in Williams' argument is a large leap in forensic faith and the hypothesis that, during the 7-year interval between the murder trial and the videotape deposition, Merrilee, after reflective revision, had changed her favorable testimony to something less than favorable to Williams. Unlike Williams, we reject a proposed evidentiary principle that mere passage of time necessarily produces a deliberately dichotomous declaration from a witness. A purposeful deterioration in Merrilee's testimony is categorical conjecture.

Williams advances another argument. If Merrilee (Frances Forget) had been a witness in the murder trial and testified that Williams was sane, "skillful counsel" would have been able to "impeach Forget through the testimony of other witnesses." Brief for Appellant at 6. To impeach Merrilee, Williams points to the testimony of Sheralyn Cox, namely, Merrilee's statements that Williams was "crazy." However, even the most skillful of trial advocates would not have been able to alter the Nebraska Evidence Rules and the evidentiary use of an inconsistent statement to impeach a declarant at trial.

Although Neb. Evid. R. 607 (Neb. Rev. Stat. § 27-607 (Reissue 1985)) recites, "The credibility of a witness may be attacked by any party, including the party calling him," Neb. Evid. R. 801 (Neb. Rev. Stat. § 27-801 (Reissue 1985)) provides:

> (3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted; and

> (4) A statement is not hearsay if:
>
> (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . .

As stated in *State v. Johnson*, 220 Neb. 392, 397, 370 N.W.2d 136, 140 (1985): "[W]hat was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Rule 801(4)(a)(i) are satisfied."

Therefore, subject to the exception specified in rule 801(4)(a)(i), a witness' inconsistent statement may be admissible evidence to aid the jury in evaluating that witness' credibility, but a witness' inconsistent statement is not substantive evidence of the matter asserted unless such statement is otherwise admissible under the Nebraska Evidence Rules. See, *State v. Marco*, 220 Neb. 96, 368 N.W.2d 470 (1985); *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982); *State v. Payne*, 205 Neb. 522, 289 N.W.2d 173 (1980).

Merrilee's statements to Sheralyn Cox were not "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Neb. Evid. R. 801(4)(a)(i). Consequently, Merrilee's statements were hearsay and not substantive evidence on the issue of Williams' mental condition and his defense of insanity. If Merrilee, as a witness in the murder trial, had been impeached by her statements to Sheralyn Cox, Merrilee's credibility and the weight to be given to her testimony would have been matters for evaluation and determination by the jury. See *State v. Robertson,* 223 Neb. 825, 394 N.W.2d 635 (1986).

Assuming skillful counsel's achieving total discredit of Merrilee at the murder trial, causing the jury to attach no significance whatsoever to her testimony, there were still four psychiatrists as witnesses who supplied substantive evidence on the issue of Williams' insanity. While Williams may be disappointed in the outcome of his trial, he does not suggest, and the record does not disclose, in what manner the absence of

testimony from Merrilee resulted in an unfavorable or detrimental performance by Williams' trial counsel. Thus, from the verdict of guilty, Williams has traveled 360° in postconviction proceedings and returned to the point of beginning, his valid conviction for the two murders.

A defendant can waive the right to assistance of an attorney unhindered by a conflict of interest, provided such waiver is voluntarily, knowingly, and intelligently done with sufficient awareness of relevant circumstances and likely consequences. *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984). Whether Williams waived his right to counsel free from a conflict of interest is a question not decided by the district court. For that reason consideration of Williams' waiver, if any, is not necessary for disposition of the appeal before us and, therefore, is not reviewed.

After a review of all the record, the "totality of the evidence," see *Strickland v. Washington*, 466 U.S. 668, 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), we find that Williams has failed to establish the second component in the two-part test for a claim of ineffective assistance of counsel as the result of a conflict of interest, namely, Williams has not shown that a conflict of interest adversely affected his trial counsel's performance. Therefore, there is no prejudice, either presumed or proved, to Williams as the result of his trial counsel's conduct. We find no error by the district court and, thus, affirm the judgment denying postconviction relief to Williams.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM E. THARP, APPELLANT.
395 N.W.2d 762

Filed November 7, 1986. No. 86-116.

Right to Counsel. Once a defendant has been informed of his right to retained or appointed counsel, there is no requirement that the court advise the defendant, on each subsequent court appearance, of the same right.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Owen A. Giles, for appellant.

Robert M. Spire, Attorney General, and Charles E. Lowe, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

This is an appeal from an order of the district court for Sarpy County affirming defendant's conviction and sentence in the county court for Sarpy County for driving an automobile while his operator's license was suspended, in violation of Neb. Rev. Stat. §§ 60-418 and 60-430 (Reissue 1984). For the reasons hereinafter stated we affirm the judgment of the district court.

The record reveals the following. On March 2, 1985, defendant was stopped by an officer of the LaVista Police Department for driving through a red traffic control light. The defendant was unable to provide a driver's license or registration. The police officer requested a standard record check, which disclosed that defendant was driving while his license was suspended. A search preparatory to an arrest revealed a knife, in defendant's pocket, with a blade length of 4 inches. The defendant was arrested and charged in three counts with driving under suspension, driving without an operator's license, and carrying a concealed weapon.

At the initial arraignment proceedings held on March 20, 1985, the defendant appeared without counsel. Defendant stated that he understood his constitutional rights, and after the court inquired if defendant was going to hire an attorney of his

own choosing, defendant informed the court he was. The matter was continued for further arraignment on April 10, 1985, to give the defendant an opportunity to talk to an attorney of his choosing.

At the subsequent arraignment proceedings on April 10, defendant again appeared without counsel. A group arraignment was conducted. The county court informed the group of defendants as follows:

> The first order of business, we're going to take those who plan or want to claim the services of the public defender. If you are charged with an offense on which a jail sentence could be imposed and if it would prejudice or jeopardize your ability to support yourself or your dependents to hire your own lawyer, you have a right to claim the services of the public defender.

The record shows that defendant was before the court when this advice was given and that defendant informed the court he wanted to hire his own attorney and had already talked to him. Defendant also informed the court that his private attorney had told him to go before the court and enter a plea of not guilty to all the charges. The court accepted that plea of not guilty, and the case was set for trial on July 23, 1985.

On July 23 defendant again appeared without counsel before the court. At this time defendant informed the court that he had requested a jury trial when he had appeared on April 10. The court informed defendant that records before the court showed no request for a jury trial, but allowed defendant an opportunity to check the recording of the April 10 arraignment to determine if a jury had been requested. Defendant admitted, after checking, that the recording did not show a request for jury trial. The court then told defendant that the county attorney was ready to proceed, that a trial to the court would be held immediately, and that, while defendant was without counsel, the trial would proceed because defendant had before indicated that he had counsel.

Before the trial began, the county attorney informed the court that a plea agreement had been reached between defendant and the county attorney. Pursuant to the agreement, the court accepted defendant's guilty plea as to count I, driving

under suspension, and again informed defendant of the penalty for driving while his license was suspended. A factual basis for the plea was set out by the county attorney and agreed to by defendant. Before accepting defendant's plea, the court again informed defendant of the penalty for driving while his license was suspended. The court then found defendant's plea to be voluntary and intelligent, accepted the plea of guilty to count I, and, on the State's motion, dismissed counts II and III.

The court set sentencing for October 11, 1985. Defendant did not appear, was later arrested for failure to appear, and was brought before the court on October 21, 1985. A new bond was set, and defendant appeared before the court for sentencing on November 8, 1985. At this hearing defendant again appeared without counsel and, after questioning by the court, informed the sentencing court that he had waived his right to counsel on July 23, 1985, when he had entered his plea. Defendant was sentenced to pay a fine of $250 plus costs and expenses, serve a term of 40 days in the Sarpy County jail, and have his driving privileges revoked for a period of 1 year.

The defendant appealed pro se to the district court, stating in a filed handwritten document, "I intend to appeal my sentence on the 8 day of Nov. . . . ." Defendant appeared before the district court on January 3, 1986, again without counsel. Defendant asked for a continuance of the sentencing hearing. The hearing proceeded, and the matter was submitted to the district court. On January 10, 1986, defendant again appeared without counsel before the court. On that date the district court affirmed the judgment of the county court, stating that the district court had reviewed the record in the county court, that the sentence imposed was well within the limits provided by statute, and that there was no abuse of discretion by the county court. On February 6, 1986, private counsel for defendant filed a notice of appeal to this court.

Defendant first assigns as error the district court's action in affirming the judgment "[i]n the absence of a record that affirmatively demonstrated that Appellant had counsel or had validly waived his right to counsel when he entered his plea of guilty . . . ." As the facts recited above clearly disclose, the defendant was advised of his right to counsel at his initial

appearance before the county court and was advised of his right to request appointed counsel at his arraignment on April 10, 1985. Defendant chose to appear without counsel on repeated occasions. We hold that once a defendant has been informed of his right to retained or appointed counsel, there is no requirement that the court advise the defendant, on each subsequent court appearance, of the same right. After defendant has been so advised, his conduct in appearing without counsel may result in a waiver of counsel. The course of conduct defendant chose to follow in this case operated as a waiver of counsel. The district court was correct in affirming the county court in this regard.

In his second assignment of error defendant alleges, "The Court Below erred by depriving Appellant of his right to counsel." Defendant's argument presents the contention that defendant was entitled to counsel to present his appeal from the county court to the district court. Defendant argues that nothing appears on the record of the appeal to demonstrate that appellant was advised of his right to counsel. Defendant relies on this court's decision in *State v. Moore*, 203 Neb. 94, 277 N.W.2d 554 (1979), for support of his argument that if the defendant was deprived of his constitutional right to counsel in presenting his appeal to an appellate court, then he was not afforded an effective appeal and the decision must be deemed a nullity. Defendant's reliance on *Moore* is misplaced. That case involved an indigent defendant who did, in fact, ask for appointed counsel for his appeal to the district court following his conviction in the municipal court of Omaha. The appellant in the case at bar did not, at any time, ask for appointed counsel, but actually proceeded with the appeal on his own behalf. While this court has held that an accused person is entitled to counsel at every critical stage of the proceeding, see *Moore, supra*, we hold that an appellate court is not required to independently inform the defendant of his right to counsel when the defendant has already been fully informed of this right and has voluntarily and intelligently waived this right.

As stated above, once a defendant has been informed of his right to counsel, there is no requirement that the same information be conveyed to a defendant on each subsequent

court appearance. As in the case of the waiver of the right to counsel at a trial, any right a defendant may have to counsel on appeal may be waived by the defendant's conduct. In this case defendant was advised of his right to counsel, appealed pro se, and appeared before the appellate court (the district court) without counsel. Such conduct constitutes a waiver of defendant's known right to counsel.

The district court reviewed the entire record of the county court and considered whether the sentence itself was made within the county court's discretion. The district court determined there was no error in the record and that the sentence was not an abuse of the county court's discretion. We agree. The order of the district court, affirming the judgment of the county court, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STANLEY J. BAKER, APPELLANT.

395 N.W.2d 766

Filed November 7, 1986. No. 86-435.

1. **Evidence: Verdicts: Appeal and Error.** In reviewing the sufficiency of the evidence, it is not within this court's province to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Convictions: Circumstantial Evidence.** A conviction may be based on circumstantial evidence where the evidence, taken as a whole, establishes guilt beyond a reasonable doubt.
3. _____: _____. A person charged with a crime may be convicted solely upon the basis of circumstantial evidence.
4. **Circumstantial Evidence: Drunk Driving.** Circumstantial evidence may establish the operation or actual physical control of a motor vehicle, under the provisions of Neb. Rev. Stat. § 39-669.07 (Reissue 1984).
5. **Plea in Abatement: Appeal and Error.** Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Wilbur C. Smith and Eileen A. Hansen, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

After a bench trial the defendant, Stanley J. Baker, was found guilty of (1) operating or being in actual physical control of a motor vehicle while under the influence of alcoholic liquor, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984), and (2) refusing to take a breath test for alcoholic content when requested to do so by a law enforcement officer, in violation of Neb. Rev. Stat. § 39-669.08 (Reissue 1984). He was fined $200 and sentenced to 7 days in jail on each count, the sentences to run concurrently, and his operator's license was suspended for 180 days. Upon appeal to the district court the judgments were affirmed.

The defendant has assigned four errors on this appeal: (1) The court erred in overruling his plea in abatement; (2) The court erred in finding that Deputy Landrie observed the defendant operating or in actual physical control of a motor vehicle when she approached him; (3) The court erred in finding beyond a reasonable doubt, from circumstantial evidence, that the defendant had been operating a motor vehicle while under the influence of alcohol; and (4) The court erred in finding that the defendant refused to take the breath test when it found he had been operating or in actual physical control of a motor vehicle when apprehended.

The record shows that at 1:48 a.m. on September 20, 1985, Deputy Sheriff Kathleen Landrie observed a car parked in the turning lane on 144th Street at California Street in Douglas County, Nebraska. When the deputy approached the vehicle, she saw that the defendant was asleep on the driver's side, behind the steering wheel. The defendant, who was alone in the car, was leaning against the open car window. The deputy

detected a strong odor of alcoholic beverage in the vehicle.

After the deputy awakened the defendant, he stated, "Look, babe, I don't want any trouble." When asked for his registration and license, the defendant rummaged through his pockets and, at one point, withdrew his car keys and placed them in the car's ignition. The defendant was eventually able to produce his registration and license, but with great difficulty.

The defendant was then asked to get out of the car and perform field sobriety tests. He had to hang on to the door to exit his car, and performed the tests unsatisfactorily. He was subsequently arrested for driving while under the influence. After being transported to a road patrol office, the defendant was read an implied consent advisement. He then refused to take any further tests or to supply any type of body fluid sample.

The defendant testified at trial that he is an over-the-road truckdriver who has a habit of pulling his truck off the road and sleeping whenever he gets drowsy while driving. On the evening in question the defendant had driven from Fremont, Nebraska, to an Omaha, Nebraska, bowling alley, after returning from a 10½-hour trip from Chicago, Illinois. Between 11:30 p.m. or midnight and 1 a.m., the defendant consumed four or five alcoholic drinks. He left the bowling alley sometime before 1 a.m. and began driving home to Fremont. At about 144th and California Streets, the defendant pulled over onto what he thought was a median, off the road. He testified that his reason for doing this was to sleep, because he was tired from all the driving he had done that day. After pulling over, the defendant turned off the ignition and put the keys in his pocket. He testified that he was dazed and confused, when first approached by Deputy Landrie, because he had been asleep.

The defendant's plea in abatement alleged in substance that he was not operating or in actual physical control of the motor vehicle, when he was apprehended by the deputy sheriff, because the vehicle was parked, the defendant was asleep, the motor was not running, and the keys were in his pocket.

The general rule is that any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient

evidence. *State v. Lehman*, 203 Neb. 341, 278 N.W.2d 610 (1979). Thus, the issue is whether the evidence was sufficient to support the conviction.

In his next two assignments of error, the defendant complains that the trial court erred in finding he was operating or in actual physical control of a motor vehicle when observed by Deputy Landrie and in finding there was sufficient circumstantial evidence to prove beyond a reasonable doubt that he had been operating a motor vehicle while under the influence of alcohol. All three assignments are without merit, since there was sufficient circumstantial evidence from which the trier of fact could find beyond a reasonable doubt that the defendant had been driving while under the influence of alcoholic liquor.

It is clear that a person charged with a crime may be convicted solely upon the basis of circumstantial evidence. *State v. Ellis,* 223 Neb. 779, 393 N.W.2d 719 (1986). Circumstantial evidence may also serve to establish the operation or actual physical control of a motor vehicle, under the provisions of § 39-669.07. *State v. Orosco*, 199 Neb. 532, 260 N.W.2d 303 (1977), *overruled on other grounds, State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983).

A conviction may be based on circumstantial evidence where the evidence, taken as a whole, establishes guilt beyond a reasonable doubt. *State v. Wilkening*, 222 Neb. 107, 382 N.W.2d 340 (1986); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981).

In reviewing the sufficiency of the evidence, it is not within this court's province to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Ellis, supra.*

In *State v. Eckert*, 186 Neb. 134, 181 N.W.2d 264 (1970), this court, in response to a similar contention, held there was sufficient circumstantial evidence to show the defendant was operating his motor vehicle on a public highway while under the influence of intoxicating liquor. The facts in *Eckert* are very similar to those in the present case. In *Eckert* the defendant was

found parked in the right-hand lane of a public highway, slumped over the steering wheel of his car, in a drunken stupor. The defendant was the sole occupant, with no other person in proximity to the vehicle. No liquor or liquor containers were found in or near the car. The vehicle was not moving, and the engine was not running. The defendant stated he had no recollection of events from the time he left his point of departure until he was aroused by law enforcement officials at the time of his arrest.

In the instant case the defendant attempts to distinguish *Eckert* on grounds that the evidence was insufficient to show he was under the influence of intoxicating liquor when he drove to the 144th and California Streets location. Instead, he maintains he parked in the turn lane not because he was under the influence like the defendant in *Eckert* but because as a truckdriver he had a habit of pulling over to sleep when drowsy.

Taking the view most favorable to the State, we must reject the defendant's argument. There was evidence, including the defendant's testimony, from which the trier of fact could find that the defendant had driven to the 144th and California Streets location. He was the sole occupant of the vehicle parked in the turn lane at 1:48 in the morning, and the keys to the car were in his pocket. Further, there was evidence from which the court could conclude the defendant was under the influence of alcoholic liquor when he drove to that location. The defendant parked his car in a turn lane and fell asleep. When he was awakened by the deputy, the defendant's breath smelled of alcohol, his speech was slurred, his eyes were bloodshot, and he performed poorly on field sobriety tests. There is no evidence in the record of any liquor or liquor containers in or near the defendant's vehicle at the time of his arrest.

Additionally, the defendant's testimony was that he drank four or five drinks in the 60 to 90 minutes preceding his 1 a.m. drive to the point of the arrest. From all of this evidence the trial court could find beyond a reasonable doubt that the defendant was guilty of driving while under the influence, in violation of § 39-669.07.

In his final assignment of error, the defendant contends the trial court erred in finding he refused to take a breath test as

required by § 39-669.08(2). That section provides:

> Any law enforcement officer who has been duly authorized to make arrests for violations of traffic laws of this state or of ordinances of any city or village may require any person arrested for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor to submit to a chemical test of his or her blood, breath, or urine for the purpose of determining the alcoholic content of his or her body fluid, when the officer has reasonable grounds to believe that such person was driving or was in the actual physical control of a motor vehicle upon a public highway in this state while under the influence of alcoholic liquor.

In essence, the defendant argues he should not have been required to submit to a chemical test because the deputy had no reasonable grounds to believe the defendant was driving or in actual physical control of a motor vehicle while under the influence.

While the deputy did not observe the defendant driving, we have concluded that she observed the defendant under circumstances from which the trier of fact could find beyond a reasonable doubt that the defendant had driven while under the influence of alcoholic liquor, in violation of § 39-669.07. Since the circumstances she observed were sufficient to convict the defendant, the deputy clearly had reasonable grounds to believe that he had committed the offense, as required in § 39-669.08(2). Thus, there is no merit to this final assignment of error. See, also, *Porter v. Jensen*, 223 Neb. 438, 390 N.W.2d 511 (1986).

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. LARRY DICKSON, APPELLEE.
395 N.W.2d 770

Filed November 7, 1986. No. 86-679.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Susan M. Koenig and Michael P. Norris, Deputy Hall County Attorneys, for appellant.

Daniel M. Placzek and D. Steven Leininger of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

WHITE, J.

This is an appeal from the order of the district court for Hall County suppressing statements made by the appellee, brought before a single judge of this court pursuant to Neb. Rev. Stat. § 29-116 (Reissue 1985). The facts of this case are set out in detail in the earlier one-judge opinion, *State v. Dickson*, 223 Neb. 397, 389 N.W.2d 785 (1986) (*Dickson I*), and need not be repeated.

In *Dickson I* a single judge of this court reversed the Hall County District Court's decision to suppress certain statements made by the defendant with reference to the death of his mother. The case was remanded to the district court for a consideration of the statements pursuant to the totality of the circumstances test. The district court's analysis was directed to include evidence of Dickson's mental capacity at the time the statements were made. The State assigns as error the district court's decision to again suppress the appellee's statements. That decision is affirmed.

In *Dickson I* a per se approach to the determination of the admissibility of volunteered statements of the mentally ill was rejected. *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). In *Blackburn v. Alabama*, 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960), the U.S. Supreme Court said: "[A] complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the

particular circumstances of the case." *Id.* at 207. The Supreme Court has denoted three distinct situations in which, under the due process clause of the 14th amendment, the confession of the defendant must be suppressed. They are: (1) confessions of doubtful reliability because they were obtained by offensive police practices; (2) confessions obtained by offensive police practices, which are not of doubtful reliability; and (3) confessions obtained, regardless of the method, under circumstances in which the free choice of the defendant was significantly impaired. 1 W. LaFave & J. Israel, Criminal Procedure § 6.2(b) (West 1984). It is this last category with which this case is concerned.

The State argues that the voluntary statements of Larry Dickson in which he admitted, to some degree, responsibility for his mother's death ought to be admitted because they were not coerced or induced in any way. The State contends that absent interrogation in a custodial situation the due process clause does not apply. As was stated in *Dickson I,* the State bears the burden in a suppression hearing to show by a preponderance of the evidence that the statements were voluntary and, therefore, admissible. *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974). To be admissible the statements must have been given freely, voluntarily, and without promises or inducements on the part of the State. *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986). Finally, voluntariness will be tested by the totality of the circumstances, and the finding of the trial court will not be set aside unless clearly wrong. *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985).

As one of the psychiatrists testified by deposition:

> There is no reason to believe that his psychotic process interfered with knowing the consequences of an act. If you say "of his acts," I'm not sure, you know, that even he knows what happened that particular day, because I don't think he can sort out what is delusion, you know. Or, you know, if we could sort out what is delusional, we still would have to be faced with what he hallucinated. He, by his description, heard voices that can only be delusional or hallucinated. And he has some beliefs involved in the alleged event that are of a psychotic quality. They just

don't reality test.

The thrust of Dr. Kenney's statement is that he was unable to tell whether, in a given circumstance, the defendant was reciting a fact, stating his memory of a previous hallucination, or giving his impression of an existing delusion.

The district court sustained the defendant's motion to suppress. The decision of the district court is supported by the evidence in the record. *State v. LaChappell,* 222 Neb. 112, 382 N.W.2d 343 (1986); *State v. Bowersmith, ante* p. 6, 395 N.W.2d 527 (1986). It is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL EDWIN WILCOX, APPELLANT.

395 N.W.2d 772

Filed November 14, 1986. No. 85-991.

1. **Speedy Trial.** With certain periods of exclusion, Neb. Rev. Stat. § 29-1207 (Reissue 1985) requires that persons indicted or informed against for any offense be tried within 6 months of the filing of the information.
2. _____. Generally, the time from filing to final disposition of the defendant's pretrial motions is excluded in calculating the last permissible day for trial. Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1985).
3. _____. Judicial delay, absent a showing of good cause, does not toll the speedy trial statute.
4. _____. Regarding tolling of the speedy trial statute, the State has the burden to establish that the time comes within one of the exclusions; a failure to carry that burden warrants reversal.
5. _____. The right to a speedy trial does not grant a defendant the right to demand immediate attention or first priority.
6. _____. A defendant must accept delay as a consequence of making pretrial motions, where delay is not inordinate or unreasonable.
7. _____. Where a single pretrial motion of the defendant was under advisement for more than 1 year 3 months 23 days, the defendant was subjected to unreasonable, inordinate delay.
8. _____. The defendant is entitled to discharge of the offense charged where he was not tried within 6 months of the filing of the information. Neb. Rev. Stat. § 29-1208 (Reissue 1985).

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded with directions to dismiss.

Dennis R. Keefe, Lancaster County Public Defender, and Sean J. Brennan, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

The defendant, Michael Edwin Wilcox, was convicted of possession of marijuana with intent to deliver under Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1985) and sentenced to 2 years' probation. He asserts two assignments of error, that he was denied his right to a speedy trial under Neb. Rev. Stat. § 29-1207 (Reissue 1985) and that the trial court erred in determining that he did not have standing to challenge the admissibility of evidence seized in a warrantless search. We hold that the defendant was denied his right to a speedy trial and is entitled to total discharge of the offense charged, in accord with Neb. Rev. Stat. § 29-1208 (Reissue 1985). We accordingly reverse and remand with directions to dismiss the information with prejudice.

On October 6, 1983, law enforcement officers seized marijuana from an outbuilding located behind the house the defendant shared with his girlfriend in rural Lancaster County, and arrested the defendant. He was subsequently charged and bound over to the district court. An information was filed on October 27, 1983. The defendant filed a motion to suppress the seized material on January 12, 1984. The motion was denied 1 year 7 months 24 days later. The defendant submitted the motion before the first judge on January 25, 1984, less than 2 weeks after filing. After the defendant rested, the State asserted for the first time that the defendant lacked standing to contest the search. The court ordered a further hearing on February 22, 1984, after the standing issue was briefed.

Prior to the time set for further hearing on the motion, i.e.,

February 13, 1984, the judge wrote counsel a letter notifying them of his intent to recuse himself from deciding the motion. On April 10, 1984, the judge formally recused himself, and a second judge contacted counsel.

The record indicates no action in the case for 1 year 4 months 10 days. On August 20, 1985, the third judge received a transcript of the hearing conducted before the first judge and took the standing issue under advisement. Sixteen days later, on September 5, 1985, the third judge denied the defendant's motion to suppress. From filing to disposition, the motion took 1 year 7 months 24 days to resolve.

On September 17, 1985, the case was called before the first judge. The defendant moved to dismiss the information, asserting violation of his right to speedy trial. The motion was denied. The defendant was brought to trial before the court and convicted on September 20, 1985; 1 year 10 months 24 days after the information was filed.

Section 29-1207 requires that persons indicted or informed against for any offense be tried within 6 months of the filing of the information. Certain periods of time set out in the statute are to be excluded in calculating the last permissible day for trial. As set out in the statute in subsection (4)(a), generally the time from filing to final disposition of the defendant's pretrial motions is excluded from computation. *State v. Long*, 206 Neb. 446, 293 N.W.2d 391 (1980). In *State v. Fatica*, 214 Neb. 776, 336 N.W.2d 101 (1983), time spent by the defendant in discovery was properly excluded; however, delays due to the prosecutor's schedule were not charged against the defendant even though the discovery motions were pending at the time. Neither does judicial delay, absent a showing by the State of good cause, toll the statute, as recognized in *State v. Alvarez*, 189 Neb. 281, 290, 202 N.W.2d 604, 610 (1972): "The mandate of the statute must therefore be followed and such things as improper or inefficient docket management, scheduling of trials, or failure to use . . . an available judge from another district cannot be deemed 'good cause.' "

The State has the burden to establish that the time properly comes within one of the exclusions; a failure to carry that burden warrants reversal. *State v. Beck*, 212 Neb. 701, 325

N.W.2d 148 (1982); *State v. Kinstler*, 207 Neb. 386, 299 N.W.2d 182 (1980); *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978); *State v. Hankins*, 200 Neb. 69, 262 N.W.2d 197 (1978).

The right to a speedy trial does not grant a defendant the right to demand immediate attention or first priority. See, *State v. Clouse*, 195 Neb. 671, 240 N.W.2d 36 (1976); *State v. Watkins*, 190 Neb. 450, 209 N.W.2d 184 (1973). A defendant must accept delay as a consequence of making pretrial motions, where delay is not inordinate or unreasonable. *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985); *State v. Fatica, supra; State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983). The questions presented in this case are whether the length of time taken to resolve the motion is inordinate and unreasonable, and, if so, how much of the delay is not to be attributed to the defendant.

In computing the time chargeable to the State, we note that 2 months 16 days elapsed between the filing of the information and the filing date of the motion to suppress. This time is properly chargeable to the State. The State contends that the time between the filing of the motion to suppress and the first judge's announcement of his recusal are not properly chargeable to the State (1 month 1 day). We agree.

The State concedes in its brief that it is improper to attribute the entire time the motion was unresolved to delay of the defendant, and submits that the time between the first judge's decision to recuse himself and his formal recusal (1 month 28 days) should be charged to the State. We agree.

However, the State contends that all remaining elapsed time until disposition of the motion is not chargeable to the State (1 year 4 months 26 days). Charging the State with the 15 days from disposition of the motion to the date of trial, the State's position is that the defendant was brought to trial in 4 months 27 days from the filing of the information, all other time being charged to the defendant.

For 16 days of the 1-year 4-month 26-day period from the formal recusal to resolution, the record shows the motion was actively under advisement. The rest of the time in question it lay dormant. Yet the total amount of time the State contends should be charged against the defendant during this period as

ordinary delay is over 30 times greater than the portion of that time the record demonstrates was actively spent resolving the motion. This delay cannot conceivably be described as a reasonable, ordinary consequence of filing one motion. We cannot charge the entire time from the formal recusal to resolution of the motion to the defendant.

How much of this time should be charged against the State as unreasonable delay and how much time should be attributed to the defendant under § 29-1207(4)(a) remain to be determined in order to figure out whether the State brought the defendant to trial within 6 months. We refuse the defendant's suggestion that we adopt a per se rule as a guide to what time is reasonable for resolution of pretrial motions. We also decline the task of determining exactly which days were spent reasonably and how many unreasonably. However, it is clear that 4 months 27 days are already charged against the State, leaving the State only 1 month 3 days to bring the defendant to trial. If more than 1 month 3 days are to be charged against the State as unreasonable delay, the defendant was not brought to trial within 6 months.

From the first judge's formal recusal to the disposition of the motion, 1 year 4 months 26 days passed. To say that only 1 month 3 days or less of that time is unreasonable is to say that 1 year 3 months 23 days or more is a reasonable, ordinary delay that a defendant must suffer as a consequence of a single motion to suppress evidence being taken under advisement. This we cannot require the defendant to tolerate. Therefore, more than 1 month 3 days of time was due to unreasonable delay chargeable to the State, and the defendant was untimely tried.

At the close of the State's evidence, commenting on the defendant's motion to dismiss for failure to bring him to trial within 6 months, the court said: "The matter was never finally submitted. It was never taken under advisement, actually . . . it really didn't get lost because everybody knew about it, they just didn't want — perhaps nobody wanted to do anything about it." The record makes the same impression upon this court. Judicial delay, absent a showing of good cause, does not suspend a defendant's right to a speedy trial. *State v. Alvarez*,

defendant's motion was not a waiver of his right to a speedy resolution of the charges against him; a court cannot table a motion and thereby suspend the defendant's right where judicial delay otherwise would warrant discharge of the offense charged.

The defendant was brought to trial 1 year 10 months 24 days after the information was filed. During most of that time, the motion was pending. While the defendant must accept reasonable delay as a consequence of his motion, unreasonable delay will not toll the statute.

Having decided that the defendant is to be discharged under § 29-1208, there is no need to address the second assignment of error.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

FORKER SOLAR, INC., A PENNSYLVANIA CORPORATION, APPELLEE, V. JOHN L. KNOBLAUCH ET AL., APPELLANTS.

396 N.W.2d 273

Filed November 21, 1986. No. 85-468.

1. **Actions: Pleadings.** A cause of action pleaded by amendment ordinarily relates back to the original pleading, provided that claimant seeks recovery on the same general set of facts.
2. _____: _____. The theory of recovery is not itself a cause of action. If the general facts upon which the right to recover is based are the same, the amendment relates back to the original pleading.
3. **Default Judgments: Motions to Vacate.** Factors to be considered in determining whether a trial court abused its discretion in rendering a default judgment include the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings.
4. _____: _____. One who seeks to set aside a default judgment against him must show that neither he nor his attorney was negligent in failing to appear and defend.
5. **Default Judgments: Motions to Vacate: Laches.** A judgment will not be set aside on the application of a party who has, by his own laches, failed to avail himself of an opportunity to defend.
6. **Contracts: Corporations: Estoppel.** A person who contracts with a corporation

is estopped from later denying its corporate existence.

7. **Pleadings: Corporations.** A general denial does not put corporate character in issue.
8. **Fraud.** To maintain an action for damages for false representations, the plaintiff must allege and prove, by a preponderance of evidence, the following elements: (1) that a representation was made; (2) that the representation was false; (3) that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely on it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damage as a result.
9. _____. A person is justified in relying upon a representation made to him as a positive statement of fact, when an investigation would be required to ascertain its falsity.
10. **Fraud: Damages.** In an action for fraud a party may recover such damages as will compensate him for the loss or injury actually caused by the fraud and will place him in the same position as he would have been in had the fraud not occurred.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

David L. Herzog, P.C., for appellant Knoblauch.

J. Russell Derr of Erickson & Sederstrom, P.C., for appellants Putnam and Solar Marketing Company.

John D. Hartigan, Jr., of Kennedy, Holland, DeLacy & Svoboda, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

This case arose out of a controversy concerning a "Distributor Agreement" between the plaintiff, Forker Solar, Inc., and the defendant Solar Marketing Company (SMC). Both of these parties are corporations.

In 1977 Henry P. Forker IV, a resident of Pennsylvania, became interested in solar heating devices that were being manufactured by Solar, Inc. Forker came to Nebraska to investigate the product, which was known as the "Solar-Aire" System, and to meet the principals involved in the company. When he found he was unable to purchase stock in the manufacturing company, he decided to obtain a franchise to

distribute the equipment.

SMC is a corporation which was organized by the defendants John L. Knoblauch and James Putnam early in 1977 to handle the sales and distribution of the equipment. On April 8, 1977, SMC entered into an agreement with Solar, Inc., of Mead, Nebraska, to market the "Solar-Aire" System. A short time later, Knoblauch became a director of Solar, Inc. Forker met and talked with Knoblauch and Putnam and was provided with literature and information concerning the "Solar-Aire" System. Forker then organized the plaintiff, Forker Solar, Inc., for the purpose of distributing the equipment under a franchise agreement.

On November 17, 1977, the plaintiff and Solar Marketing Company entered into the distributor agreement which authorized the plaintiff to sell solar products in a described area in Pennsylvania and Ohio for a period of 2 years. The agreement was signed on behalf of Solar Marketing Company by Knoblauch, as president. Under the agreement the plaintiff was obligated to pay a licensing fee of $42,617, purchase a $15,000 inventory of solar products, establish a central warehouse, and establish and maintain retail dealerships.

On November 23, 1977, Knoblauch sent Forker a letter of welcome to the company, which predicted a great future for the new joint enterprise. On December 7, 1977, the plaintiff paid $28,808.50, one-half of the balance due on the agreement, to SMC. Six weeks later, on January 19, 1978, Knoblauch resigned from his position as president and left SMC to go to Valmont Industries. Forker was notified of Knoblauch's departure by a letter dated January 25, 1978, from Leo Arens, the new vice president and treasurer of SMC.

In January 1978 Forker attended a meeting in Columbus, Ohio, which was a training session concerning the equipment, its installation, operation, etc. The defendant Knoblauch was one of the lecturers at this meeting.

Forker sent the final payment due under the agreement to SMC in March or April 1978. Putnam was then president of SMC. Solar, Inc., terminated its agreement to supply products to SMC on April 7, 1978. Later that year, Forker and Putnam signed a second distributorship agreement.

The second agreement did not expressly supersede the first, and it contained several provisions which differed from the first. It granted additional territory to the plaintiff, the 2-year licensing fee was reduced to $1, the minimum inventory requirement was raised to $18,500, and SMC agreed to sell the plaintiff any solar products, rather than "Solar-Aire" products exclusively. Additionally, the agreement provided that at the time of its execution SMC owed Forker $18,500 in inventory.

Forker testified that the plaintiff entered into the second agreement because he thought he was

> in a position to press Putnam for more territory, just simply because he [Putnam] couldn't meet his demands. . . . [H]e was willing to give up that additional territory for a dollar . . . . And we took it, ah, thinking that we might as well get something and hopefully . . . he'd get healthy and we'd get healthy.

Forker testified that he viewed the second agreement as an extension of the first one. SMC did not "get healthy," but went out of business. Putnam notified Forker on January 24, 1979, that SMC was no longer in business.

This action was commenced against Knoblauch, Putnam, and SMC on June 7, 1979, seeking recovery on theories of securities violations, breach of contract, fraud, and breach of fiduciary duty. An amended petition was filed June 5, 1984, which alleged only that misrepresentations made by the defendants induced Forker to enter into the first distributorship agreement and caused him to suffer damages. Forker alleged special damages consisting of $42,617, the 2-year license fee; $15,000, representing the purchase price of the inventory required by the agreement; and $15,000 as costs of organizing and promoting the dealership.

Trial began April 11, 1985. Knoblauch was present at the trial and represented by counsel, but Putnam and SMC were neither present nor represented. The jury returned a verdict against Knoblauch in the amount of $67,616. The trial court granted the plaintiff a default judgment against Putnam and SMC on May 29, 1985, for the same amount. This appeal followed.

Knoblauch alleges 13 assignments of error which essentially contend the judgment is not supported by the evidence and is

contrary to law. Putnam and SMC contend the default judgment should be vacated and that the cause of action for fraud and deceit alleged in the amended petition was barred by the statute of limitations.

The statute of limitations contention is also made by Knoblauch. Neb. Rev. Stat. § 25-207(4) (Reissue 1985) requires all actions sounding in fraud to be brought within 4 years of the discovery of the fraud. Knoblauch and Putnam contend the cause of action for fraud and deceit is barred because the original petition alleged fraud only against SMC.

This contention is not supported by the facts of the case or the law. In the original petition four causes of action were alleged. The first cause of action alleged all of the parties had violated federal and state securities laws. The second cause of action alleged fraud against SMC, and alleged that Knoblauch and Putnam had made misrepresentations to Forker concerning SMC and the solar products it distributed. The third cause of action alleged SMC had breached its contract with the plaintiff. The fourth cause of action alleged that Knoblauch and Putnam exercised such control over SMC that the corporation had no separate existence, that the two men used the corporation to perpetrate the wrongs alleged in the first cause of action, and that this control and breach of statutory duty caused the plaintiff's loss. In addition, the petition contained allegations concerning SMC's proposed network of franchised dealers, SMC's alleged exclusive rights to market certain solar products, and representations made by Knoblauch and Putnam which had induced the plaintiff to enter into the agreement.

The amended petition did not plead the securities violations or breach of contract. Instead, the amended petition alleged solely that misrepresentations made by Knoblauch and Putnam, who purportedly acted "in the guise of Solar Marketing Company," induced the plaintiff to rely on their representations and enter into the first distributorship agreement, which caused its loss. Many of the allegations contained in the original petition were reiterated in the amended petition: the initial meeting of the parties, SMC's plans to build a nationwide franchising network, and the agreement itself.

The misrepresentations attributed to Knoblauch and Putnam in the amended petition were almost identical to those alleged in the original petition, and both petitions alleged these misrepresentations induced the plaintiff to enter into the first agreement.

A careful reading of the two petitions shows that both allege the same operative facts and seek recovery for the same injury. The original petition sounded in fraud and breach of contract, while the amended petition is limited to fraud. The plaintiff modified its theory of recovery in the amended petition but did not state a new and independent cause of action.

This court has consistently held that "[a] cause of action pleaded by amendment ordinarily relates back to the original pleading provided that claimant seeks recovery on the same general set of facts." *Abbott v. Abbott*, 185 Neb. 177, 181, 174 N.W.2d 335, 338 (1970). See, also, *Knoell Constr. Co., Inc. v. Hanson*, 210 Neb. 628, 316 N.W.2d 321 (1982). The theory of recovery is not itself a cause of action; therefore, if the general facts upon which the right to recover is based are the same, the amendment relates back. *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971).

Appellants Putnam and SMC next assign as error the trial court's failure to vacate the default judgment and grant them leave to file an amended answer to the amended petition. It is their position that the default judgment was not properly entered against them because the notice requirements of rule 12 of the Rules of Practice for the Fourth Judicial District (rev. 1985) were not followed, and because the interests of justice would require vacation.

This argument is not persuasive. Rule 12A applies to default judgments entered before trial upon the failure of a defendant to plead or appear. Rule 12B requires that a party who has appeared but later defaults must be given notice, as in other cases, of a hearing upon a motion for default judgment, or the assessment of damages, or the taking of proofs in cases. Appellants contend that rule 12B required the trial court to notify them of the hearing on the plaintiff's motion for default judgment. The trial court held rule 12B was not applicable to this case but applied only to hearings on default motions prior

to trial.

Our reading of the rule confirms the trial court's construction. Under rule 12B a defendant must receive notice of a hearing on a default motion prior to trial. In this case the default judgment was entered after trial on the merits. Putnam received notice of the trial and the hearing on the motion for a default judgment. His failure to appear and defend was a lack of due diligence and does not constitute grounds for the vacation of the default judgment.

Nebraska law has long recognized the need to set aside default judgments to ensure that litigants have a fair opportunity to present their contentions in court. See, e.g., *Urwin v. Dickerson*, 185 Neb. 86, 173 N.W.2d 874 (1970); *Lacey v. Citizens Lumber & Supply Co.*, 124 Neb. 813, 248 N.W. 378 (1933); *Lichtenberger v. Worm*, 41 Neb. 856, 60 N.W. 93 (1894). A countervailing consideration must be balanced against this need: the duty of the courts to prevent unnecessary delays in the prosecution of actions and to guard against dilatory and frivolous proceedings. *Urwin, supra.*

Factors to be considered in determining whether a trial court abused its discretion in rendering a default judgment include the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings. *Michaelis v. Michaelis*, 187 Neb. 350, 190 N.W.2d 783 (1971); *Commercial Sav. & Loan Assn. v. Holly Development, Inc.*, 182 Neb. 335, 154 N.W.2d 510 (1967).

In *Commercial Sav. & Loan Assn., supra* at 339-40, 154 N.W.2d at 513, this court stated, " '[T]he general rule is that one who seeks to set aside a default judgment against him must show that neither he nor his attorney was negligent in failing to appear and defend a suit. . . .' " Similarly, in the earlier case of *Cleland v. Hamilton Loan & Trust Co.*, 55 Neb. 13, 14-15, 75 N.W. 239, 240 (1898), in denying a motion to vacate a default judgment obtained by the use of a forged signature, we held,

> It is an inflexible rule that a party seeking relief in equity from a judgment taken against him by default must exhibit a defense to the action and also show that such judgment is the result of fraud, accident, or mistake,

> unmixed with fault or negligence on his part. A judgment will not be set aside on the application of a party who has, by his own laches, failed to avail himself of an opportunity to defend. This salutary rule rests on principle and authority, and its rigid enforcement is necessary for the repose of society, by preventing litigation from becoming interminable.

More recently, in *Anderson Mktg. Associates v. Roberts*, 215 Neb. 670, 340 N.W.2d 384 (1983), this court reversed the trial court's vacation of a default judgment, on the grounds the defendant failed to duly defend the action. The record in that case clearly disclosed the defendant's lack of due diligence. The default judgment had been entered after a 17-month period, during which the defendant had filed only one minor pleading.

The facts of this case are similar to *Anderson*, and clearly evidence Putnam's and SMC's lack of due diligence. Putnam had notice of the trial and the default hearing. Leave to amend the answer was sought 1 year after the amended petition was filed, and almost 6 weeks after trial. The record does not show the trial court abused its discretion in denying the motion to vacate the default judgment, and the default judgment against Putnam and SMC is affirmed.

Knoblauch contends that the plaintiff is not the real party in interest and that the plaintiff's corporate existence was not proven at trial. Both contentions are without merit. The record shows that Forker entered into both distributorship agreements as president of the plaintiff. Forker testified as to his title, his duties, and the capitalization of the plaintiff. He also testified as to some of the expenses the company incurred as a result of the agreements. The only logical inference to be drawn from the record is that Knoblauch recognized the plaintiff as a corporation when he signed the first agreement.

A person who contracts with a corporation is estopped from later denying its corporate existence. *Retail Merchants Service v. Bauer & Co.*, 125 Neb. 61, 248 N.W. 813 (1933); *American Gas Construction Co. v. Lisco*, 122 Neb. 607, 241 N.W. 89 (1932). Knoblauch is therefore estopped from questioning the plaintiff's corporate existence.

Further, Knoblauch filed a general denial to the original

pleading and did not specifically deny the plaintiff's corporate existence. A general denial does not put corporate character in issue. *Davis v. Nebraska Nat. Bank of Omaha*, 51 Neb. 401, 70 N.W. 963 (1897); *Dietrichs v. L. & N. W. R. R.*, 13 Neb. 43, 13 N.W. 13 (1882); *National Life Ins. Co. v. Robinson*, 8 Neb. 452, 1 N.W. 124 (1879).

Knoblauch next asserts that the plaintiff failed to present a prima facie case of misrepresentation against him. He contends the record does not show that he made any claims, assurances, or representations to the plaintiff and Forker. Knoblauch further argues that Putnam's deposition, when read into evidence, so confused the jury that Putnam's statements were improperly attributed to him. Knoblauch also contends that any representations he made did not relate to a present or preexisting fact. Finally, Knoblauch contends that the plaintiff's recovery is barred for two reasons: First, because if the plaintiff had properly investigated before investing, it could have prevented the loss; and second, because after the first payment was made, the plaintiff was on notice of the facts which now form the basis of the action, and acted in disregard of those facts.

A jury verdict will not be disturbed on appeal "unless it is clearly erroneous, against the preponderance of the evidence, and so clearly contrary to the findings that it is the duty of the reviewing court to correct it." *Maricle v. Spiegel*, 213 Neb. 223, 232-33, 329 N.W.2d 80, 87 (1983). See, also, *Krug v. Laughlin*, 208 Neb. 367, 303 N.W.2d 311 (1981); *Lintner v. Roos*, 202 Neb. 476, 276 N.W.2d 93 (1979).

A jury verdict will be considered sufficient if the record discloses any competent evidence which supports a finding for the successful party. *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985). Conflicts in the evidence and the credibility of witnesses are for the jury's determination, not the court on review. *Id.* See, also, *Kniesche v. Thos*, 203 Neb. 852, 280 N.W.2d 907 (1979); *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), *disapproved on other grounds* 213 Neb. 782, 332 N.W.2d 39 (1983).

All inferences which may be drawn from the evidence must

be drawn in favor of the prevailing party. *Anderson v. Farm Bureau Ins. Co.*, 219 Neb. 1, 360 N.W.2d 488 (1985); *Duncza v. Gottschalk*, 218 Neb. 879, 359 N.W.2d 813 (1984); *Farm Bureau Life Ins. Co. v. Luebbe*, 218 Neb. 694, 358 N.W.2d 754 (1984). Our review is limited to determining whether the record evinces sufficient facts to support the verdict.

To maintain an action for damages for false representations, the plaintiff must allege and prove, by a preponderance of evidence, the following elements: (1) that a representation was made; (2) that the representation was false; (3) that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely on it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damage as a result. *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986).

The amended petition alleged all six elements of misrepresentation. The specific misrepresentations alleged included (1) that SMC had the exclusive right to distribute the "Solar-Aire" System; (2) that the "Solar-Aire" System was currently manufactured and sold for use to consumers by various distributors and dealers in SMC's marketing network; (3) that the "Solar-Aire" System had been laboratory and field tested, and its scientific viability established; (4) that no manufacturing or installation problems were being encountered; and (5) that SMC was ready to fill all orders for the system which Forker might place.

At trial Knoblauch testified that as a director of Solar, Inc., he had attended meetings throughout the fall of 1977 at which the products' quality, company finances, and production problems were discussed. He also admitted that he knew about the financial condition of Solar, Inc., prior to his resignation. Additionally, he admitted knowing about the leakage problem and having discussed it with Forker. He denied having knowledge of the results of certain laboratory tests, however, and stated that in April of 1977 SMC had a warehouse full of inventory, as well as a large number of distributors.

Knoblauch contends this testimony clearly shows that he made no misrepresentations to Forker which would support the

jury verdict. In addition, he testified that, before resigning from SMC, he called Forker and warned him to investigate further before sending the balance due on the contract. He did not follow that conversation with a letter or warn the rest of the distributors. Forker denies that such a conversation took place.

In a fraud case direct evidence is not essential, but proof of fraud drawn from circumstantial evidence must not be guesswork or conjecture, but must be rational and logical deductions from the facts and circumstances from which they are inferred. *ServiceMaster Indus. v. J.R.L. Enterprises*, 223 Neb. 39, 388 N.W.2d 83 (1986). See, also, *Workman v. Workman*, 174 Neb. 471, 118 N.W.2d 764 (1962). The circumstances must be " ' "of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom." ' " *ServiceMaster Indus., supra* at 44, 388 N.W.2d at 86 (citing *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944)).

Several elements of fraud are clearly established in this record: Knoblauch's knowledge of the poor financial condition of the parent company, the attendant production problems, and the dubious future of SMC at the time of his resignation. The jury could find that Knoblauch knew of these problems when the first agreement was negotiated, when the first payment was received, and at the time of his resignation. There was conflicting evidence as to whether Knoblauch actually warned Forker of these problems. The jury decided that issue against Knoblauch. The evidence was sufficient for the jury to make that finding. *Kniesche v. Thos*, 203 Neb. 852, 280 N.W.2d 907 (1979).

Knoblauch next argues any liability he may have had to the plaintiff was eliminated by the second agreement. This argument is not persuasive. The plaintiff sustained its loss when Knoblauch failed to warn it of the inevitable failure of Solar, Inc., and SMC. The second agreement was viewed by Forker and Putnam as a continuation of the first agreement, and it did not increase the plaintiff's loss.

Similarly, Knoblauch's arguments that the plaintiff's recovery is barred by its failure to investigate and its continued participation with SMC are without merit.

Nebraska law imposes a duty of ordinary prudence. *Bank of Valley v. Mattson*, 215 Neb. 596, 339 N.W.2d 923 (1983). A person is justified in relying upon a representation made to him as a positive statement of fact, when an investigation would be required to ascertain its falsity. *Id.* See, also, *Fricke v. Hart*, 206 Neb. 590, 294 N.W.2d 737 (1980); *English v. Bruin Engineering, Inc.*, 201 Neb. 791, 272 N.W.2d 753 (1978).

In this case Forker was justified in relying on the statements made during the contract negotiations, as well as the provisions of the contract itself. To discover the falsity of those representations, Forker would have had to make an independent investigation of the financial security and manufacturing capability of the parent company, Solar, Inc., as well as independent laboratory and field tests of the product. In a similar case, *Little v. Gillette*, 218 Neb. 271, 354 N.W.2d 147 (1984), the plaintiff sued two realtors for misrepresenting the economic viability of a business she had purchased from them. At trial there was evidence the realtors knew the previous operation was a financial disaster, yet assured the plaintiff of the potential profits in the business. We found such evidence sufficient to support a verdict for the plaintiff. The defendants' argument the plaintiff should have investigated further was found not to be convincing. Since an independent investigation of the facts would have been required, the plaintiff was entitled to rely on the defendants' representations.

The final issue is whether the jury verdict is excessive. Forker alleged special damages in the amount of $72,617. The jury awarded damages in the amount of $67,616. At trial the plaintiff presented evidence of the two payments to SMC in the amount of $57,617, as required by the first agreement. The only additional evidence of damage was Forker's testimony that his corporation was capitalized by the infusion of $10,000 in cash, and by his testimony that his business had the "normal overhead of a small business."

In an action for fraud a party may recover such damages as will compensate him for the loss or injury actually caused by the fraud and place the defrauded party in the same position as he would have been in had the fraud not occurred. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

See, also, *Harsche v. Czyz*, 157 Neb. 699, 61 N.W.2d 265 (1953). One who enters into an agreement by virtue of a material misrepresentation may either affirm the agreement and sue for damages or disaffirm the agreement and sue to be reinstated to the position which existed before entering into the contract. *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985). Here, the plaintiff chose to affirm the contract and sue for damages.

The plaintiff's evidence at trial established actual damages in the amount of $57,617. This figure represents the amount paid on the first agreement, for which the plaintiff did not receive the agreed-upon consideration. Since no other sufficient proof of damages was presented, the verdict for $67,617, as well as the default judgment for that amount, is excessive. We conclude the record will not support an award in excess of $57,616, and a remittitur of $10,000 should be awarded.

The cause is remanded and the plaintiff shall have 10 days after the filing of the mandate of this court in the district court in which to file an acceptance of the remittitur. The judgment shall draw interest from the date the remittitur is accepted.

In the event the plaintiff fails to accept the remittitur, the defendants are granted a new trial as to the issue of damages only.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JEANNETTE ELAINE WAGNER, APPELLEE, V. JAMES FRANK WAGNER, APPELLANT.

396 N.W.2d 282

Filed November 21, 1986. No. 85-494.

1. **Child Support: Modification of Decree.** A proceeding to modify a child support order is not a retrial of the original case nor a review of the original decree.
2. _____: _____. The paramount issue in child support cases, whether originally or in proceedings for modification, remains the best interests of the children.

3. _____: _____. Increased age of children alone will not furnish a satisfactory basis for a modification of child support unless accompanied by competent evidence of the actual increase in the cost of maintaining the children.
4. **Child Support: Modification of Decree.** Although as a general rule a decree awarding child support will not be modified because of a change of circumstances which was in the contemplation of the parties at the time the original or preceding order was made, we limit that rule to include only those anticipated changes which were specifically noted on the record made at the time of entry of the previous order. To the extent that the language of *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985), has been misinterpreted, that interpretation is expressly disapproved.
5. **Child Support: Modification of Decree: Appeal and Error.** Questions relating to the modification of child support are initially entrusted to the sound discretion of the trial court, and, although on appeal we are required to review the record de novo, in the absence of an abuse of discretion, the decision of the trial court will be affirmed.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Samuel G. Kaplan, for appellant.

Lynn B. Lamberty of Steinacher, Vosoba & Hanson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

Upon application of the petitioner-appellee, the district court modified a November 15, 1978, decree by increasing child support for two children from $41 per week for both children to $150 per month per child.

The respondent, the former husband, has appealed, claiming that the only change in circumstances shown was the increased age of the children due to the passage of time. It is his contention that under the rule set forth in *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985), a change of circumstances involving the mere passage of time does not support or justify a modification of an award of child support.

It is true that in *Graber* we said:

> Furthermore, not all material changes justify modification. Indeed, if the changes are of the type that necessarily were in the contemplation of the parties at the

> time the decree was entered, even though material, such changes do not, *of themselves*, justify a modification. For instance, it obviously is in the contemplation of all of the parties in every case that the children involved will grow older and that their needs will therefore change. That fact, *standing alone*, is not sufficient to justify a modification of a decree of dissolution.

(Emphasis supplied.) *Id.* at 819, 374 N.W.2d at 10.

However, the claimed changes of circumstances in *Graber* were the increased income of the former husband, the former wife's illness preventing her from obtaining gainful employment, an increase in mortgage payments required of her, and her desire to send the children to a private school. What the court found was that the evidence did not support the existence of such changes or, in the case of the latter two items, that both were anticipated by the parties at the time of the decree.

Graber was intended to emphasize the longstanding rule that a proceeding to modify a child support order is not a retrial of the original case nor a review of the original decree. *Tworek v. Tworek*, 218 Neb. 808, 359 N.W.2d 764 (1984). Unfortunately, the language cited above perhaps overstated the case and, as aptly set forth in the concurring opinion, was based on cases involving modification of alimony orders.

We do reemphasize the longstanding rule that the paramount issue in child support cases, whether originally or in proceedings for modification, remains the best interests of the children. *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985).

In spite of language such as that from *Pfeiffer v. Pfeiffer*, 201 Neb. 56, 58, 266 N.W.2d 82, 84 (1978), "It is also to be noted that as the ages of the children increase, the expense of care is generally greater," we do hold that evidence of the increased age of children alone will not furnish a satisfactory basis for a modification of child support unless accompanied by competent evidence of the actual increase in the cost of maintaining the children. The record must disclose the circumstances as they existed originally and the present facts supporting the change.

Regarding the further language of *Graber* denying a modification of child support due to changes that "necessarily

were in the contemplation of the parties at the time the decree was entered," 220 Neb. at 819, 374 N.W.2d at 10, we limit that to anticipated changes which were specifically noted on the record at the time. For example, if the record reflects that orthodontia work on a child was planned for the following year and provisions were made therefor, once the treatment was actually begun and completed, the fact that the custodial parent is now faced with the payment for those services normally would not support a modification of the decree. On the other hand, the fact that a younger sibling is later found to be in need of similar services is not an anticipated change of circumstances because it was likely that children of the same family would require such treatment.

To the extent that certain language of *Graber* perhaps has been misinterpreted, that interpretation is expressly disapproved.

The evidence in the record indicates that the children are now ages 9 and 12. The petitioner, at the time of the original decree, had net earnings of $3,056, and at the time of the modification hearing such earnings had been reduced to approximately $1,981. By this time the petitioner had remarried. The respondent's gross income from the time of the dissolution to the hearing on the modification had remained rather constant, although for some unexplained reason respondent claimed his net income in that period of time had been reduced from approximately $16,500 to $13,990.

However, estimates though they were, the evidence seems to be undisputed that petitioner's monthly expenses have increased from $396 at the time of the decree of dissolution to a point where at the time of the modification hearing the monthly expenses attributable to the children totaled $727. These totals consisted of individual categories including housing, utilities, food, clothing, medical, insurance, automobile, and school.

Questions relating to the modification of child support are initially entrusted to the sound discretion of the trial court, and, although on appeal we are required to review the record de novo, in the absence of an abuse of discretion, the decision of the trial court will be affirmed. *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986).

Following a de novo review of the record, we find that the judgment of the trial court was correct and should be affirmed.

AFFIRMED.

ROY A. JOHNSON, APPELLANT, V. SHEILA K. JOHNSON, APPELLEE.
396 N.W.2d 284

Filed November 21, 1986. No. 85-947.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Emily R. Scherr of Law Offices of Robert C. Guinan, for appellant.

William G. Line of Kerrigan, Line & Martin, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

Petitioner has appealed from the judgment of the district court in a marriage dissolution case which awarded custody of the parties' minor child to the respondent.

The record before this court consists only of the transcript. It is impossible for us to review errors which require a consideration of the evidence, in the absence of a bill of exceptions. *Taylor v. Wallesen*, 222 Neb. 411, 384 N.W.2d 270 (1986).

The pleadings support the action of the trial court and disclose no abuse of discretion. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

DALE THOMAS AINSWORTH, APPELLANT, V. BARBARA JEAN AINSWORTH, APPELLEE.

396 N.W.2d 285

Filed November 21, 1986. No. 85-968.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the sound discretion of the trial court. On appeal the judgment of the trial court will be affirmed in the absence of a clear abuse of discretion.
2. **Child Custody.** The paramount consideration in determining who should have the care and custody of minor children following dissolution of a marriage is the best interests of the children.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Jerry J. Milner, for appellant.

L.W. Kelly, Jr., of Kelly & Kelly, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an appeal in a proceeding for dissolution of a marriage. The trial court dissolved the marriage; divided the property of the parties; awarded custody of the minor children to the respondent, Barbara Jean Ainsworth, subject to reasonable rights of visitation in the petitioner, Dale Thomas Ainsworth; and awarded child support.

The sole issue on appeal is the award of custody of the minor children to the respondent.

The parties were married on June 16, 1979. They have two children: Tonya Maria, born December 1, 1979, and Crystal Gail Ann, born August 25, 1981.

The parties separated in mid-October of 1984. From that time until December 3, 1984, the respondent had custody of the children during the week, while the petitioner had custody on weekends.

When the petition for dissolution of the marriage was filed, the trial court, by an ex parte order, awarded temporary custody of the children to the petitioner. On December 27, 1984, the parties stipulated to joint custody, pending trial, which gave

the parties custody on alternating weeks.

Trial was had on July 12, 1985. On August 26, 1985, the trial court awarded custody of the children to the respondent. From that order the petitioner has appealed.

The petitioner contends the trial court abused its discretion in awarding custody to the respondent, because there is considerable evidence raising doubt as to the respondent's moral fitness, stability, and capacity to provide for the physical care and needs of the children.

Although our review of the judgment is de novo on the record, child custody determinations are matters initially entrusted to the sound discretion of the trial court. On appeal the judgment of the trial court will be affirmed in the absence of a clear abuse of discretion. *Clark v. Clark*, 220 Neb. 771, 371 N.W.2d 749 (1985). We also "give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other." *Id.* at 777, 371 N.W.2d at 754. The paramount consideration in determining who should have the care and custody of minor children following dissolution of a marriage is the best interests of the children. *Id.*

The petitioner claims the respondent is of questionable moral fitness based on evidence that she sometimes stayed out late following her night shift job in 1983, that she moved in with a boyfriend and his parents shortly after the separation, and that she "allowed" the children to look at pornographic magazines. The record does not show that the incidents of staying out late occurred after 1983, some 2 years prior to trial. Further, the record shows that the children were not uncared for on the occasions when the respondent stayed out late in 1983, as the petitioner, who worked a day job, was at home with the children.

According to the respondent, she moved in with her then boyfriend's family around December 1, 1984, because of financial considerations. On December 3 the court's ex parte order awarded temporary custody of the children to the petitioner, so that the respondent only had custody on weekends. The respondent testified that when she did have the children, she and the children slept in a room separate from the

boyfriend. The respondent stopped seeing the boyfriend on a personal basis in mid-December of 1984.

Following entry of the order of joint custody on December 27, the respondent moved to a two-bedroom trailer in Doniphan, Nebraska, where she resided at the time of trial.

The petitioner contends the respondent could not provide a stable environment, as evidenced by the fact that she lived in four different residences and with two different families in the 2 1/2 months following the couple's separation. The respondent's testimony indicates that immediately following the separation she and the two children moved in with friends in Grand Island, Nebraska, for approximately 2 weeks. From there the respondent moved into a Grand Island apartment. She stayed in that apartment for only 1 month because, at that time, she could not afford the rent. The respondent then moved in with the boyfriend's family, who did not charge her rent because they wanted to help her get back on her feet financially. Within a week of the December 27 joint custody order, the respondent moved into the Doniphan trailer, where she remained the 6 months prior to trial.

Finally, the petitioner contends there are serious doubts about the respondent's ability to provide for the physical care and custody of the children, based on evidence that she had poor housekeeping skills and did not always provide balanced meals, she was not always prompt in delivering or picking up the children at the day-care center, and she declined to have the children taken to a doctor after they had begun receiving treatments for head lice. The testimony as to the respondent's housekeeping skills related to the condition of the marital home when both parties lived there. This testimony reflected unfavorably on both parties.

The respondent testified that normally she prepares balanced meals, but does on occasion "slack off." The day-care provider testified by deposition that other than on two occasions, the respondent was prompt in delivering or calling for the children at the day-care center. On one occasion the respondent was late in retrieving the children because she had car trouble.

The record does not support an inference that the children

contracted head lice as a result of any fault in the respondent's care. In fact, the condition was discovered after the children had been with the petitioner for a few days. When the children were returned to the respondent the next week, she continued the treatments that had been prescribed by a physician. Later, the respondent declined the petitioner's suggestion to take the children to the physician, because the condition was "clearing up."

While the parties lived together, they both worked and were equally responsible for the care of the children. Except for the fact that the children were sometimes dressed in diapers, the petitioner noticed nothing unusual about the care the respondent provided for the children. The petitioner testified that there were no major problems experienced during the joint custody period pending trial. There is also evidence that the respondent has made many of the children's clothes and has stayed home from work with them when they were ill.

The record does not support a finding that the respondent was without the moral fitness, stability, or capacity to provide for the care and custody of the children. Both parties have a history of providing for the children, and the trial court did not clearly abuse its discretion in awarding custody to the respondent.

The judgment is affirmed. Each party shall pay his or her own costs.

AFFIRMED.

CLAYTON MILEY LUCE, APPELLEE, V. PAULINE MARIE SCHANCE, FORMERLY PAULINE MARIE LUCE, APPELLANT.

396 N.W.2d 287

Filed November 21, 1986. No. 86-122.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Sandra I. Schefcik of Schefcik Law Firm, for appellant.

William C. Peters, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Pursuant to agreement, the decree of dissolution placed custody of the parties' minor child jointly in the appellant mother and appellee father. Nine months after the decree, the mother alleged that the joint custody obligations were not being fulfilled and prayed that she be given sole custody of the child. The father responded by asking that sole custody be placed in him. Following a 2-day trial, at which the evidence overwhelmingly demonstrated that the parties had not been able to fulfill their respective joint custody obligations, and at which much conflicting evidence was adduced as to which parent should have sole custody, the district court terminated the joint custody arrangement and placed sole custody in the father. Upon de novo review we conclude that the record fails to show that the district court abused its discretion in so ruling. Under that circumstance the judgment of the district court is to be, and hereby is, affirmed. *Ainsworth v. Ainsworth, ante* p. 160, 396 N.W.2d 285 (1986).

Appellant shall pay the costs of this appeal, including $750 to apply toward the services of appellee's attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SCOTT B. KENNEDY, APPELLANT.

396 N.W.2d 722

Filed November 21, 1986. Nos. 86-218, 86-219.

1. **Waiver: Words and Phrases.** A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
2. **Waiver.** A voluntary waiver, knowingly and intelligently made, must affirmatively appear from the record, before a court may conclude that a

defendant has waived a right constitutionally guaranteed or granted by statute.

3. **Pleas: Waiver: Indictments and Informations.** A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional, except the defense that the indictment, information, or complaint is not sufficient to charge an offense.
4. **Pleas: Waiver: Trial: Right to Counsel.** A valid guilty plea waives the right to a trial, whether a trial by jury or without a jury, and waives the right to counsel, including the right to court-appointed counsel in an otherwise appropriate case.
5. **Pleas.** A factual basis for a guilty plea may be established by inquiry of the defendant.
6. **Constitutional Law: Criminal Law: Due Process: Jury Trials.** Notwithstanding constitutional mandates regarding a jury trial, such as the sixth amendment to the U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution, there is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of imprisonment of 6 months or less.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Judgment in No. 86-218 affirmed. Judgment in No. 86-219 reversed, and cause remanded with direction.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Scott B. Kennedy appeals from the judgment of the district court for Adams County, affirming Kennedy's convictions and sentences in the county court.

Initially, Kennedy was charged in two complaints. The first complaint (case No. 86-218) consisted of three counts, that is, two counts of third degree assault, a Class I misdemeanor, Neb. Rev. Stat. § 28-310 (Reissue 1985), and one count of criminal mischief—intentional damage to another's property, causing pecuniary loss in excess of $100 but less than $300, see Neb. Rev. Stat. § 28-519(1)(a) and (3) (Reissue 1985), which is a Class II misdemeanor. The three-count complaint alleged Kennedy's assault on Mary L. Porter and damage to Porter's personal property (an automobile). The second complaint (case No.

86-219) charged Kennedy with disturbing the peace of DeAnn L. Patterson. Disturbing the peace is a Class III misdemeanor. See Neb. Rev. Stat. § 28-1322 (Reissue 1985).

At an arraignment on April 8, 1985, and after the complaint for the assaults and criminal mischief had been read to Kennedy, the county judge informed Kennedy about the range of penalties possible on conviction of each charge, including the possibility of consecutive sentences. Additionally, the court informed Kennedy regarding the right to a jury trial and confrontation of the State's witnesses, the privilege against self-incrimination, and the right to assistance of counsel. Upon inquiry by the court Kennedy acknowledged that he understood the charges against him, as well as the various rights and privilege mentioned. The court then informed Kennedy: "Now in order to get a jury trial in this court, you must tell the court that you want a jury trial and you must tell the court of that desire within 10 days after you enter your plea of not guilty." Kennedy then stated he would retain a lawyer and return to court on April 12 to enter a plea. After posting bond Kennedy was released and, on April 12, in a written "plea of not guilty," signed and filed by his lawyer, entered a not guilty plea to each of the charges in the three-count complaint and requested a jury trial. Although Kennedy had not been arraigned on the charge of disturbing the peace alleged in the second complaint, Kennedy's lawyer, nevertheless, filed a "not guilty" plea and request for a jury trial regarding that second complaint.

The court ordered a pretrial conference for May 3. On motion by Kennedy's lawyer the court rescheduled the pretrial conference for June 7, and Kennedy's lawyer requested, and was granted, a continuance to June 28 regarding the pretrial conference. On June 10, Kennedy's lawyer also filed a motion to withdraw, alleging he was unable to contact Kennedy, who had failed to respond to letters from the lawyer. The court permitted Kennedy's lawyer to withdraw on June 13.

When Kennedy, without counsel, appeared for the pretrial conference on June 28, the county attorney called the court's attention to the fact that Kennedy had not been arraigned on the complaint charging Kennedy with disturbing the peace. An arraignment on the disturbing the peace charge was held,

during which the court informed Kennedy concerning the privilege against self-incrimination and all the various rights previously mentioned at arraignment on the other charges (assaults and criminal mischief). The court, recognizing that Kennedy had requested a jury trial on both complaints, proceeded to review the history of continuances granted in Kennedy's cases, scheduled and rescheduled pretrial conferences, and Kennedy's appearance without counsel. After acknowledging that he was not prepared for the pretrial conference, Kennedy told the court he was obtaining a lawyer. The court responded:

> [T]he Court is prepared; the defendant is not. And as far as the Court is concerned, that constitutes a withdrawal of the defendant's request for a jury trial. This matter's still gonna go on ahead for trial, and I'm gonna set a trial date today, but it's gonna be without a jury. And it'll be without an attorney on your part if you don't get one. Because you haven't requested one, and you indicate that you're able to get your own. And we'll go on ahead and set this for trial.

The court set both complaints for trial on July 29 and informed Kennedy "there will be no jury trial." At that point the following colloquy occurred:

> MR. KENNEDY: . . . [C]an I recommend a jury trial?
>
> THE COURT: No, jury trial is all over with. There won't be any jury trial. There'll just be a trial with a judge sitting up here making a decision as to whether or not the State proves it's [sic] case beyond a reasonable doubt.
>
> MR. KENNEDY: That's it?
>
> THE COURT: Yep. Instead of the six people that would normally or might be sitting over there. And in fact a vast majority of our trials are trials in front of a judge rather than a jury.
>
> MR. KENNEDY: I can't ask for a jury trial?
>
> THE COURT: You already asked for it, and because you weren't ready to go today and because you've already had two continuances, and I mean ready to go today with a pre-trial conference, the jury trial is washed out.

Later, during the pretrial conference, the court stated: "[I]t's

pretty darn difficult to have a jury trial where someone is not represented by a lawyer. And if they're not prepared for the pre-trial conference, then they don't get the jury trial."

At the conclusion of the pretrial conference, the court answered Kennedy's inquiry about court-appointed counsel:

> [W]e will not appoint one for you if you make that request in less than two weeks before the trial. Because that again is your responsibility to make that decision and get in here. Because we will not postpone the trial beyond July 29th, except for good cause. And it's not good cause if you're not making an effort to get [a] lawyer. And you should know whether or not, at least two weeks before the trial, whether or not you have a lawyer.

Before trial Kennedy never requested appointment of counsel. On July 29 Kennedy appeared without counsel and, without asserting indigency or supplying any documentation on the aspect of indigency, orally requested appointment of counsel for the trial. See Neb. Rev. Stat. § 29-1804.13 (Reissue 1985) (appointment of counsel for an indigent charged with a misdemeanor). After the court denied Kennedy's request for appointed counsel, the case was tried without a jury, namely, a bench trial on the two complaints. The State called witnesses who testified about Kennedy's assaults on Mary Porter and infliction of damage to Porter's automobile. At a recess during the State's case, Kennedy and the county attorney negotiated a plea for disposition of the charges of assault and criminal mischief. Pursuant to the negotiated disposition, the State amended the complaint for the assaults to charge Kennedy with two counts of third degree assault "committed in a fight or scuffle entered into by mutual consent," see § 28-310(2), a Class II misdemeanor, and retained the charge of criminal mischief in the amended three-count complaint. The court informed Kennedy concerning the penalty possible on conviction for third degree assaults as a Class II misdemeanor. See Neb. Rev. Stat. § 28-106(1) (Reissue 1985). Kennedy entered his plea of guilty to the amended complaint. The court expressly found that Kennedy's plea

> is knowingly, freely and voluntarily given; that a factual basis to support a finding of guilty has been provided by

> the State; and that defendant's plea of guilty to each of the three (3) counts of the amended complaint should be accepted and entered.
>
> The Court further advised the defendant that by entering a plea of guilty, he hereby waives his right to a trial, his right to confront accusing witnesses, his right to a trial by jury, and his privilege against self-incrimination.
>
> The Court being further advised in the premises finds that defendant understands that he has waived said rights; and that he understands the nature of the charges against him in the amended complaint and the possible penalties therefor.

The court then elicited a factual basis from Kennedy regarding the offense charged in each count of the amended complaint, accepted Kennedy's plea of guilty to all three charges (assaults and criminal mischief), found Kennedy guilty of the two assaults and criminal mischief, and stated: "We will proceed to try the disturbing the peace charge." The State adduced evidence regarding the disturbing the peace charge, but Kennedy did not present evidence in response to the State's case. At conclusion of the evidence on July 29, the court took the matter under advisement.

On August 5 the court found Kennedy guilty of disturbing the peace. Later, the court imposed concurrent sentences on Kennedy—imprisonment for 60 days on each conviction (assaults, criminal mischief, and disturbing the peace). Through counsel appointed after the convictions, Kennedy sought, but the court rejected, withdrawal of the guilty pleas. On appeal to the district court, the judgments of the county court were affirmed.

Regarding conviction on the charges of assault and criminal mischief, Kennedy claims that the county court erred in (1) determining that Kennedy's "request for jury trial was deemed to be withdrawn because Appellant was not prepared for a pre-trial conference" and (2) "refusing [Kennedy's] request for court appointed counsel without a reasonable inquiry into his financial condition." Concerning the conviction for disturbing the peace, Kennedy raises the same questions as those indicated in his appeal of the convictions for assault and criminal

mischief, but also claims the court erred in restricting Kennedy's cross-examination of a witness. Kennedy does not contest the court's refusal to permit Kennedy's withdrawal of his guilty pleas.

"[O]nce a defendant has been informed of his right to retained or appointed counsel, there is no requirement that the court advise the defendant, on each subsequent court appearance, of the same right." *State v. Tharp, ante* p. 126, 129, 395 N.W.2d 762, 765 (1986).

> [I]n order to support a finding that a plea of guilty or nolo contendere has been entered freely, intelligently, voluntarily, and understandingly,
>
> 1. The court must
>
> a. inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination; and
>
> b. examine the defendant to determine that he or she understands the foregoing.
>
> 2. Additionally, the record must establish that
>
> a. there is a factual basis for the plea; and
>
> b. the defendant knew the range of penalties for the crime with which he or she is charged.

State v. Irish, 223 Neb. 814, 820, 394 N.W.2d 879, 883 (1986).

A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct. See, *Branch v. Wilkinson*, 198 Neb. 649, 256 N.W.2d 307 (1977); *Mousel v. Daringer*, 190 Neb. 77, 206 N.W.2d 579 (1973); *Pester v. American Family Mut. Ins. Co.*, 186 Neb. 793, 186 N.W.2d 711 (1971). See, also, *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege"). A voluntary waiver, knowingly and intelligently made, must affirmatively appear from the record, before a court may conclude that a defendant has waived a right constitutionally guaranteed or granted by statute. See, *State v.*

Blue, 223 Neb. 379, 391 N.W.2d 102 (1986); *State v. Miles*, 202 Neb. 126, 274 N.W.2d 153 (1979).

A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional, except the defense that the indictment, information, or complaint is not sufficient to charge an offense. *State v. Golgert*, 223 Neb. 950, 395 N.W.2d 520 (1986). A valid guilty plea waives the right to a trial, whether a trial by jury or without a jury, and waives the right to counsel, including the right to court-appointed counsel in an otherwise appropriate case. *Duggan v. Olson*, 146 Neb. 248, 19 N.W.2d 353 (1945). A factual basis for a guilty plea may be established by inquiry of the defendant. See *State v. Richter*, 220 Neb. 551, 371 N.W.2d 125 (1985).

As the result of our review of all the circumstances of Kennedy's case, and in view of the standards and requirements set forth in *State v. Irish, supra*, we conclude that Kennedy's guilty pleas, validly entered and accepted, resulted in a waiver of Kennedy's right to assistance of counsel and a jury trial. Therefore, the district court's judgment, affirming Kennedy's convictions and sentences for the assaults and criminal mischief (case No. 86-218), is affirmed.

This leads us to the next part of Kennedy's appeal, the question regarding a jury trial on the charge of disturbing the peace, which is a Class III misdemeanor carrying a maximum penalty of 3 months' imprisonment, or a $500 fine, or both such imprisonment and fine. There is no statutorily stated minimum regarding a Class III misdemeanor. See § 28-106(1).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.

"The right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District Court . . . ." Neb. Const. art. I, § 6.

"In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel . . . and [have] a speedy public trial by an impartial jury . . . ." Neb. Const. art. I, § 11.

Notwithstanding the preceding constitutional mandates regarding a jury trial, not every criminal charge warrants a trial by jury.

Construing the 6th amendment right to a jury trial, applicable to the states through the 14th amendment, the U.S. Supreme Court has expressed: "Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses . . . ." *Duncan v. Louisiana*, 391 U.S. 145, 159, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). See, also, *Codispoti v. Pennsylvania*, 418 U.S. 506, 512, 94 S. Ct. 2687, 41 L. Ed. 2d 912 (1974) ("[O]ur decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes").

This court, in construing the right to a jury trial as one of the guarantees of the Nebraska Constitution, has held: "There is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of 6 months or less." *State v. Mangelsen*, 207 Neb. 213, 215, 297 N.W.2d 765, 767 (1980). See, also, *State v. Young*, 194 Neb. 544, 546, 234 N.W.2d 196, 198 (1975) (for the charge of "second offense drunk driving," punishable by a maximum penalty of 3 months' imprisonment pursuant to Neb. Rev. Stat. § 39-669.07(2) (Reissue 1974), "The defendant was not entitled to a jury trial under the Nebraska Constitution"); *State v. Nielsen*, 199 Neb. 597, 260 N.W.2d 321 (1977), *overruled on other grounds, State v. Garber,* 206 Neb. 75, 291 N.W.2d 403 (1980). Cf. *State v. Lynch,* 223 Neb. 849, 394 N.W.2d 651 (1986) (on a charge of driving "while under the influence of alcoholic liquor," in violation of a municipal ordinance and punishable by imprisonment for 6 months, the defendant was not entitled to a jury trial by virtue of the Nebraska Constitution or the U.S. Constitution).

Although there is no constitutional right to a jury trial for petty offenses, the Legislature of Nebraska has enacted Neb. Rev. Stat. § 24-536 (Reissue 1985), which in pertinent part provides: "Either party to any case in county court, except criminal cases arising under city or village ordinances, traffic

infractions, and other infractions . . . may demand a trial by jury."

As reflected by § 24-536, "[T]he right to a jury trial is part of our fundamental law." *State ex rel. Simpson v. Vondrasek*, 203 Neb. 693, 696, 279 N.W.2d 860, 863 (1979). Being a fundamental concept and a valuable process for reaching a fair and impartial decision in litigation, the right to a jury trial, although sometimes statutorily required but not constitutionally guaranteed, is accorded a defendant in the absence of a waiver of such right. Thus, while disturbing the peace, as a criminal offense, may be petty, the prescribed procedure to prove even a petty crime is not insignificant, if the will of Nebraska's people, legislatively expressed, has some stature in the criminal justice system.

That Kennedy requested a jury trial is without question. The dialogue at the pretrial conference only underscored Kennedy's desire and intention to submit his case to a jury for determination. Absence of a jury is not attributable to Kennedy's relinquishment or abandonment of his right to trial by jury. Rather, to censure Kennedy for his unpreparedness at the pretrial conference, the court precluded a jury trial. However, the right to trial by jury is not base grist to be ground under a procedural millstone as a sanction for lack of diligence attendant to a pretrial conference.

We find no affirmative showing or proof that Kennedy voluntarily and intentionally relinquished or abandoned the statutory right to a jury trial. We do find that the county court denied the jury trial requested by Kennedy. Consequently, we reverse the judgment of the district court concerning case No. 86-219 (disturbing the peace) and remand this matter to the district court with direction that the district court reverse the county court's judgment of conviction and remand this cause to the county court for further proceedings.

In view of our disposition of Kennedy's appeal in case No. 86-219, it is unnecessary to examine the questions concerning court-appointed counsel and cross-examination raised by Kennedy. However, we observe that, even if Kennedy had appeared pro se and personally conducted his own defense,

under the circumstances he was still entitled to a jury trial, a right denied by the county court.

JUDGMENT IN NO. 86-218 AFFIRMED. JUDGMENT IN NO. 86-219 REVERSED, AND CAUSE REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. JAMES C. WHITEHURST, APPELLANT.

396 N.W.2d 288

Filed November 21, 1986. No. 86-459.

Appeal from the District Court for Stanton County: RICHARD P. GARDEN, Judge. Affirmed.

Charles L. Caskey, for appellant.

Robert M. Spire, Attorney General, and Harold Mosher, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

Defendant has appealed a sentence of 2 to 5 years' imprisonment following a conviction upon his plea of guilty to the crime of manufacturing a controlled substance, marijuana, a Class III felony.

He assigns as error the receiving into evidence at the sentencing hearing the testimony of a state trooper based on information which he had received from an unnamed informant, and the excessiveness of the sentence.

There is no merit to the first assignment of error. As stated in *State v. Reeves*, 216 Neb. 206, 221, 344 N.W.2d 433, 444 (1984): " '[T]he traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.' " And later on, "Likewise, we find no constitutional requirement to permit one convicted the right to confront all who might give

information to be used by the sentencing court." *Id.* at 223, 344 N.W.2d at 445. See Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 1985).

Defendant's plea resulted from a plea agreement in which two other charges involving marijuana had been dismissed. The instant crime involved the processing of approximately 600 pounds of marijuana which were to be sold at a price of $20 per pound. Some years earlier, the defendant had been convicted of possession of marijuana and theft, as well as several traffic violations.

The statute prescribed a sentence of not less than 1 year nor more than 20 years. A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. From the record presented to us no evidence of an abuse of discretion appears. The judgment of the district court is affirmed.

AFFIRMED.

CHARLES (DAN) LARABEE, APPELLANT, V. LAFI JAFARI, APPELLEE.
397 N.W.2d 22

Filed December 5, 1986. No. 85-773.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Thomas D. Wulff and John D. Hartigan, Jr., of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Robert G. Decker, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an appeal from an order of dismissal on rehearing entered by the Nebraska Workers' Compensation Court. In entering its order the Workers' Compensation Court

acknowledged that there was a direct conflict in the testimony but concluded that the appellant, Charles (Dan) Larabee, was an independent contractor and therefore not entitled to compensation. The single assignment presented to us is whether the Workers' Compensation Court erred in failing to find that Larabee was an employee of Jafari at the time of his accident. Unless we are able to say as a matter of law that Larabee was an employee of Jafari, we are required to affirm the decision of the Workers' Compensation Court. In reviewing workers' compensation cases this court does not reweigh the facts. Our standard of review accords to the findings of fact made by the Nebraska Workers' Compensation Court after rehearing the same force and effect as a jury verdict in a civil case. Such findings will not be reversed or set aside unless clearly wrong. See *Smith v. Hastings Irr. Pipe Co.*, 222 Neb. 663, 386 N.W.2d 9 (1986). See, also, *Beavers v. IBP, Inc.*, 222 Neb. 647, 385 N.W.2d 896 (1986); *Oham v. Aaron Corp.*, 222 Neb. 28, 382 N.W.2d 12 (1986).

Furthermore, we have held that in testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of the successful party, and the successful party is given the benefit of every inference that can reasonably be drawn from the evidence. See *Hollinger v. Consolidated Motor Freight*, 223 Neb. 449, 390 N.W.2d 518 (1986).

We have reviewed the record and have determined that we cannot say as a matter of law that Larabee was an employee. Instead, consideration of all of the facts in the case could lead a court to conclude that Larabee was an independent contractor. See *Gregg v. Challburg*, 217 Neb. 143, 347 N.W.2d 559 (1984). Being unable, therefore, to say as a matter of law that Larabee was an employee, we affirm the decision of the Workers' Compensation Court.

AFFIRMED.

SANDRA F. EHRENBERG, APPELLANT AND CROSS-APPELLEE, V. DONALD LEE EHRENBERG, APPELLEE AND CROSS-APPELLANT.
397 N.W.2d 454

Filed December 5, 1986. No. 85-862.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Virginia Koerselman of Mitchell & Demerath, for appellant.

Jewell, Gatz & Collins, for appellee.

Debra Stangl, guardian ad litem.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This matter involves the dissolution of the marriage of the parties and the custody of the two minor children born to the parties as a result of the marriage. The trial court dissolved the marriage and awarded custody of the minor children to the appellant. It also granted reasonable rights of visitation to the appellee. The court has reviewed the record de novo and finds that the trial court did not abuse its discretion in awarding custody of the children to the appellant and permitting the appellee reasonable rights of visitation. See *Parsons v. Parsons*, 219 Neb. 736, 365 N.W.2d 841 (1985). The decision of the trial court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLAYTON KERN, APPELLANT.
397 N.W.2d 23

Filed December 5, 1986. No. 85-876.

1. **Venue: Appeal and Error.** A motion for change of venue filed pursuant to Neb. Rev. Stat. § 29-1301.01 (Reissue 1985) is addressed to the sound discretion of the trial court, whose ruling will not be disturbed absent a clear abuse of that discretion.

2. _____: _____. A trial court abuses its discretion in denying a motion for change of venue where the defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial.
3. _____: _____. The factors used to determine whether a change of venue should have been granted due to pretrial publicity include the nature of the publicity; the degree to which the publicity has circulated throughout the community; the degree to which the publicity circulated in areas to which venue could be changed; the length of time between the dissemination of the publicity complained of and the date of trial; the care exercised and ease encountered in selection of the jury; the number of challenges exercised during the voir dire; the severity of the offense charged; and the size of the area from which the venire is drawn.
4. **Juror Qualifications.** A juror need not be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court.
5. **Trial: Evidence.** The admission or exclusion of evidence is a matter left largely to the sound discretion of the trial judge.
6. **Rules of Evidence: Other Acts.** Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is an inclusionary rule permitting the use of relevant other crimes, wrongs, or acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character.
7. _____: _____. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) permits evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show defendant's propensity or disposition to commit the crime charged.
8. _____: _____. Evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question.
9. _____: _____. The admissibility of evidence concerning other crimes, wrongs, or acts must be determined upon the facts of each case.
10. **Rules of Evidence: Other Acts: Intent.** No exact limitation of time can be fixed as to when evidence of other crimes, wrongs, or acts tending to prove intent to commit the offense charged is remote.
11. **New Trial: Appeal and Error.** While any one of several errors may not, in and of itself, warrant a reversal, if all of the errors in the aggregate establish a defendant did not receive a fair trial, a new trial must be granted.
12. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and a finding made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
13. **Homicide: Intent.** Premeditation, or the design and purpose to kill, exists when the intent to kill is formed before the act causing the death, and not merely simultaneously with that act.
14. _____: _____. No particular length of time is required in order for

premeditation to exist; the time used in premeditating may be so short as to be instantaneous, and the intent to kill may be formed at any moment before the killing.

15. **Homicide: Intent: Trial.** Where first degree murder is charged, the elements of both premeditation and intent are for the jury.
16. **Verdicts: Appeal and Error.** After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustains some rational theory of guilt.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Bernard J. Ach and Patrick J. Craven, for appellant.

Robert M. Spire, Attorney General, and Dale A. Comer, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

A jury found defendant, Clayton Kern, guilty of first degree murder in violation of Neb. Rev. Stat. § 28-303(1) (Reissue 1985). He was thereafter so adjudged and sentenced to life imprisonment. The errors assigned to the district court question (1) its failure to grant a change of venue, (2) certain of its evidentiary rulings, and (3) its failure to find the evidence insufficient to prove the charge. The record does not sustain the errors assigned, and we therefore affirm the judgment and sentence of the district court.

Defendant had known for approximately a month prior to the killing that his wife, Theresa, intended to divorce him. Once he acquired that knowledge, defendant began treating his wife and adopted 11-year-old daughter, Laura, who was his wife's natural child, more kindly. He also asked Barbara Nigg, a close friend and neighbor, to help the couple reconcile.

When it became apparent that his wife would not reconsider her decision concerning the divorce, defendant searched for another living arrangement. While he continued to live with his wife at their Crete apartment, defendant had, on May 16, 1985, made a deposit for the rental of another apartment in the same city.

On the day of the killing, May 18, 1985, in the presence of defendant's nephew, Scott Kern, and Cherryl Woodard, one of Theresa Kern's sisters, defendant wrote a note which provided that in the event of his death Woodard was to receive any money owed to him by his employer. Defendant also stated he intended to have his employment insurance made payable first to Woodard, then to his daughter. He asked that in the event of his death Woodard give his wife $200 per month for the daughter's care. Upon his wife's death, Woodard was to use the money to care for the daughter. Defendant also told Woodard that she was to use part of the money to buy three burial plots and asked her to promise to bury him next to his wife.

On May 1, 1985, defendant had informed Woodard that he would rather see his wife dead than with anyone else. He also told another of his wife's sisters, Geraldine Deeringer, that he could not live without his wife and could not stand losing her. At another time during that month, "out of the clear blue," defendant had begun laughing and told Nigg he knew how to get even with his wife; he would get a spot next to where she was to be buried, and he would be buried beside her.

During the afternoon of the day of the killing, the daughter asked if she could spend the night with Woodard so that she could attend her cousin's graduation the next day. Defendant replied affirmatively, saying that he was going to let her stay at a friend's anyway if she had asked. The evidence also establishes that it was not unusual for the daughter to spend weekends with friends, and she had also not been at home the night before the killing.

Sometime before midnight on the night of the killing, defendant arrived at Woodard's residence in Ashland and wanted both Woodard and his daughter to come with him. After unsuccessfully attempting to arouse his daughter, defendant and Woodard got into defendant's automobile and began riding around. Once on the road, defendant told Woodard that he had killed his wife, stating that he had choked her to death back in their apartment when she had told him she was in love with another man. Woodard initially did not believe defendant and asked if he had been able to find a pulse. Defendant replied he had not checked for one. Woodard also

asked whether he had seen her sister's stomach move, and defendant replied that he thought he had.

Defendant and Woodard then proceeded to search for a telephone, and found one at a Greenwood bar. At the bar Woodard telephoned the Niggs and asked them to confirm whether her sister was in fact dead. Defendant then telephoned a friend, LeRoy Dimmitt, and told Dimmitt that he was in trouble because he thought he had killed his wife. Defendant also made arrangements for his nephew to come to the bar and pick up Woodard.

After those telephone calls had been made, defendant flagged down state patrolman Ronald Balthazor, who, in response to a telephone call placed by the bar owner, had been on his way to a "disturbance" at the bar. Defendant was highly agitated and began yelling, "I killed her, I killed her, I killed my wife with my own hands, I choked her to death." Defendant was then given the *Miranda* warnings, after which he stated to Balthazor that he was sure his wife was dead. When asked if he had given her any medical attention, he replied, "No, I killed her."

Defendant was later taken to the county-city jail in Lincoln for further questioning and was again given the *Miranda* warnings. According to Ronald Boardman, who questioned defendant in Lincoln, defendant stated that on the evening of the killing he and his wife had been at their apartment watching television and talking about their divorce. At what he believed to be 9 p.m., the wife said that they would make love one last time and left the room, returning undressed. While the couple was hugging and kissing, the wife told defendant she was still in love with another man. At that point defendant "lost it" and killed his wife. Defendant then carried the body into the bedroom, placed it on the bed, and planned to commit suicide. He got a knife from the kitchen, returned to the bedroom, and lay down beside his wife, but could not kill himself. Defendant then wrote a note, which was found on the headboard of the bed.

In the note defendant asked Woodard to forgive him and to take care of the things they had talked about. The note also said that while he and his wife were in bed, she said she and her lover

might get back together again, and when she said this he "just went nuts." The note went on to say he thought his wife might still be alive, and asked for help for himself and his wife if he should not succeed in his effort to kill himself. The note also observes that he was unable to kill himself. After writing the note, the defendant went to Woodard's house.

Robert Loveless, the wife's brother, testified he talked on the telephone with both defendant and his sister between 9 and 9:30 that evening and that both seemed normal.

The first assignment of error rests upon Neb. Rev. Stat. § 29-1301.01 (Reissue 1985), which provides:

> If any person shall commit an offense against the person of another, such accused person may be tried in the county in which the offense is committed, or in any county into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense, or in aiding, abetting, or procuring another to commit such offense.

The trial judge overruled the motion for a change of venue before the jury was selected. He reserved the opportunity, however, to rule differently later.

Defendant recognizes this court has ruled that a motion for change of venue filed pursuant to the foregoing statute is addressed to the sound discretion of the trial court, whose ruling will not be disturbed absent a clear abuse of that discretion. See, *State v. Heathman, ante* p. 19, 395 N.W.2d 538 (1986); *State v. Irish,* 223 Neb. 578, 391 N.W.2d 137 (1986); *State v. Navarrete,* 221 Neb. 171, 376 N.W.2d 8 (1985); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). *State v. Irish, supra*, further provides that a "trial court abuses its discretion in denying a motion for change of venue where the defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial." *Id.* at 583, 391 N.W.2d at 141. The factors used to determine whether a change of venue should have been granted due to pretrial publicity include:

"[T]he nature of the publicity; the degree to which the

> publicity has circulated throughout the community; the degree to which the publicity circulated in areas to which venue could be changed; the length of time between the dissemination of the publicity complained of and the date of trial; the care exercised and ease encountered in selection of the jury; the number of challenges exercised during the voir dire; the severity of the offense charged; and the size of the area from which the venire is drawn."

State v. Navarrete, supra at 173-74, 376 N.W.2d at 10 (quoting *State v. Fallis*, 205 Neb. 465, 288 N.W.2d 281 (1980)). Accord *State v. Heathman, supra*. Defendant invites us, however, to overrule those cases and in effect hold that a change of venue should be granted whenever a criminal defendant claims he cannot get a fair trial absent such a change, irrespective of what the evidence may show. We decline to do so, and adhere to the long-settled law of this state in considering this issue.

Defendant introduced three newspaper articles concerning the killing in support of his motion for a change of venue. Two of the articles were from Lincoln newspapers. They presented a small photograph of defendant and did little more than report the killing, the circumstances of the arrest, and the fact that a bond hearing had been held. The third article appeared in The Crete News and contained a number of photographs, including those of the defendant, his wife, the attorneys involved, and the entrance to the apartment at which the killing took place. The article gave some biographical information concerning those pictured, detailed the legal proceedings had to the date of publication, and gave the location and time of the funeral. The newspaper articles were all published within 10 days of the killing, and none contained any unduly inflammatory material.

Defendant also submitted eight affidavits in support of his motion. These documents concluded that because of The Crete News article and the community conversation about the killing, an impartial jury could not be selected.

Not only was the issue not raised during or after the jury was selected but no difficulty in selecting an impartial jury was experienced. Six of the jurors had no prior knowledge of the case. The remaining six had read newspaper accounts of the killing, but had either formed no opinion or indicated in

various ways that they could decide the case on the evidence. A juror need not be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court. *State v. Navarrete, supra; Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

The trial judge did not abuse his discretion in overruling defendant's motion for a change of venue, and there is therefore no merit to the first assignment of error.

This brings us to the second assignment of error, that the trial court erred in certain of its evidentiary rulings. We begin our analysis of this assignment by recalling that the admission or exclusion of evidence is a matter left largely to the sound discretion of the trial judge. *State v. Norfolk*, 221 Neb. 810, 381 N.W.2d 120 (1986). Defendant argues the trial judge abused his discretion in a variety of respects.

The first of these claimed errors concerns the admission of the testimony of Carolyn Garber, defendant's wife at a former time. Garber testified that on March 18, 1975, after she had told defendant she was involved with another man and while the couple was living apart and in the process of divorcing, defendant broke into her trailer home and forced her into a bedroom, saying "if I can't have you, no other man can." He then placed a pillow over her face in an apparent effort to suffocate her. However, he stopped and began sobbing. When Garber tried to escape, defendant ran after her, caught her, threw her down, seized her throat, and attempted to choke her. She passed out, and when she came to, found she was alone.

At a later time, but before the divorce decree, defendant went to Garber's home with a gun and said he was going to kill her and then commit suicide. She told him she wanted to take the children to a neighbor and would return so they could talk. While on the way to the neighbor's, she heard a gunshot and called the police when she arrived at the neighbor's house.

Defendant argues that the foregoing evidence as to his conduct with Garber is so remote in time and dissimilar in circumstances as to not be admissible on the issue of his guilt of the crime with which he is charged in this case.

Neb. Rev. Stat. § 27-404(2) (Reissue 1985) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

It is well established that § 27-404(2) is an inclusionary rule permitting the use of relevant other crimes, wrongs, or acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character. Thus, § 27-404(2) permits evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show defendant's propensity or disposition to commit the crime charged. *State v. Robb, ante* p. 14, 395 N.W.2d 534 (1986); *State v. Hunt,* 220 Neb. 707, 371 N.W.2d 708 (1985); *State v. Stewart*, 219 Neb. 347, 363 N.W.2d 368 (1985); *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985). This rule predates the 1975 adoption of § 27-404(2). See, for example, *Sall v. State*, 157 Neb. 688, 61 N.W.2d 256 (1953); *Adams v. State*, 138 Neb. 613, 294 N.W. 396 (1940).

In applying § 27-404(2) we have said that evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question. *State v. Hunt, supra; State v. Keithley*, 218 Neb. 707, 358 N.W.2d 761 (1984); *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). At times, we have equated the foregoing more complete statement of the rule with language that there must exist "unique, almost 'signature-like' similarity between the charged crime and the other crimes." *State v. Dandridge*, 209 Neb. 885, 890, 312 N.W.2d 286, 291 (1981); *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983).

We have also observed that the admissibility of evidence concerning other conduct must be determined upon the facts of each case and that no exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is remote. The question of remoteness in time is largely in the sound discretion of the trial court; while

remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence. As is generally true on questions concerning the admissibility of evidence, the question of whether other conduct is sufficiently similar to the offense charged is also a matter left largely to the sound discretion of the trial court. See, *State v. Hunt, supra; State v. Keithley, supra; State v. Ellis, supra.*

As the later discussion concerning the third assignment of error demonstrates in greater detail, defendant questions the adequacy of the evidence to establish that he either premeditated or intended the killing. That challenge distinguishes this case from *State v. Robb, supra*, which held evidence of a prior act less remote in time than those involved in the present case to be inadmissible. In *Robb* there was nothing to bring into question the assumption that one of sound mind intends the obvious and probable consequences of his or her voluntary acts. In the present case defendant asserted throughout that he neither planned the murder nor intended the obvious and probable consequences of his voluntary acts. Thus, how defendant responded in similar circumstances in the past is relevant on the issue of what he planned and intended in the present instance. The circumstances were sufficiently similar to make the evidence of his earlier conduct probative on the issue of his guilt of the offense charged. Defendant expressed much the same thought to Garber that he expressed to Woodard with respect to the victim in this case: if he could not have her, no other man could. In each instance his then wife was involved with another man. In each instance a divorce was pending. In each instance defendant resorted to the act of choking.

We recognize that Neb. Rev. Stat. § 27-403 (Reissue 1985) provides for the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of, among other things, unfair prejudice. In that connection we conclude that in view of defendant's challenge to the presence of the requisite premeditation and intent and of the other evidence bearing on the issue, admission of defendant's attacks on Garber did not result in unfair prejudice to him.

Defendant also argues that the trial judge erred in at least 31 separate instances by admitting inadmissible evidence and in permitting prosecutorial misconduct by tolerating repetitive questioning which resulted in the admission of cumulative evidence. Defendant postulates correctly that while any one of several errors may not, in and of itself, warrant a reversal, if all of the errors in the aggregate establish a defendant did not receive a fair trial, a new trial must be granted. *State v. Davis*, 185 Neb. 433, 176 N.W.2d 657 (1970). The question, thus, is whether in the aggregate the claimed errors denied defendant a fair trial.

A study of the claimed errors reveals that in some instances either defendant's objection was sustained or the question was withdrawn by the prosecutor. The bulk of the remaining objections related either to the form of the question concerning evidence which was otherwise admissible or to the cumulative nature of the evidence sought. None of the cumulative evidence received was unduly inflammatory, and most of it related to the fact that defendant's wife was dead, a fact no one disputed. While it is true that once the death had been proved, no useful purpose was served by proving it again, it cannot be said that re-proving the death deprived defendant of any substantial right. The few substantive objections which were overruled elicited responses related to inconsequential matters not at issue, and therefore did not prejudice defendant.

We must conclude that the trial judge's evidentiary rulings did not constitute an abuse of discretion and did not deny defendant a fair trial. Thus, there is no merit to this assignment of error.

The third and last assignment of error questions the sufficiency of the evidence to support the conviction. Defendant does not claim he did not kill his wife, but does claim the evidence fails to demonstrate that he either premeditated or intended the killing.

In resolving the issue presented by this assignment, it must be remembered that in determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh

the evidence. Such matters are for the trier of fact, and a finding made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Moniz, post* p. 198, 397 N.W.2d 37 (1986); *State v. Ellis,* 223 Neb. 779, 393 N.W.2d 719 (1986); *State v. West,* 223 Neb. 241, 388 N.W.2d 823 (1986); *State v. Benzel,* 220 Neb. 466, 370 N.W.2d 501 (1985). See, also, *State v. Dondlinger,* 222 Neb. 741, 386 N.W.2d 866 (1986).

Premeditation, or the design and purpose to kill, exists when the intent to kill is formed before the act causing the death, and not merely simultaneously with that act. *State v. Jones*, 217 Neb. 435, 350 N.W.2d 11 (1984); *State v. Beers*, 201 Neb. 714, 271 N.W.2d 842 (1978). However, no particular length of time is required in order for premeditation to exist; the time used in premeditating may be so short as to be instantaneous, and the intent to kill may be formed at any moment before the killing. *State v. Benzel, supra.*

The facts that defendant told Woodard he would rather see his wife dead than with another man, that he asked that his money be used to care for his daughter in the event both he and his wife died, and that he expressed the wish to be buried next to his wife certainly permit a rational finder of fact to conclude that defendant both premeditated and intended the killing. Defendant argues that what he wrote after the killing clearly demonstrates he "went nuts" and, presumably, acted without any thought at all. A rational, unbiased finder of fact, however, could well conclude that the note itself was a planned effort to obfuscate the premeditation and intent the other facts imply. The fact that defendant sounded normal to Loveless before the killing does not establish defendant was not harboring a plan to kill his wife at the time nor that such a plan did not come into existence after Loveless talked with defendant.

The question of premeditation was for the jury to determine, *State v. Benzel, supra*, as was the question of intent, *Ward v. State*, 58 Neb. 719, 79 N.W. 725 (1899). After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustains some rational theory of guilt. *State v. Moniz, supra; State v.*

Wilkening, 222 Neb. 107, 382 N.W.2d 340 (1986). See, also, *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983).

As the foregoing discussion demonstrates, there exists a rational theory of guilt; consequently, there is no merit to this last assignment of error.

AFFIRMED.

KRIVOSHA, C.J., concurring in the result.

I concur in the result reached by the majority in this case. I write separately, however, because I do not agree with the majority's view regarding the admissibility of evidence of other bad acts. As I read the record, Kern did not contend that he had not strangled his wife, but only that he had not done so with premeditation. I simply find it difficult to see how one may say that evidence that Kern attempted to suffocate a former wife 10 years ago or threatened to kill her could prove that a subsequent act was done with premeditation. The question as to whether premeditation exists is a fact question directly related to the specific case and not to previous behavior. It seems to me that the most that can be said is that the evidence was offered to show how Kern reacts to a particular situation; that is, to show that he acts in conformity with his character. That is specifically what Neb. Rev. Stat. § 27-404(2) (Reissue 1985) says cannot be shown.

The majority attempts to distinguish this case from our decision in *State v. Robb, ante* p. 14, 395 N.W.2d 534 (1986). I simply cannot see that distinction, or how this evidence was not offered simply to show that Kern acted in a way consistent with his character. I therefore believe that the evidence was inadmissible.

I concur, however, because I believe that no prejudice resulted from the introduction of this evidence. The evidence of guilt in this case was simply overwhelming. There was simply no question that Kern killed his wife by strangling her. He admitted to that fact. It is difficult to conceive how he could maintain that that was accidental under the facts of the case. He admitted placing his hands around his wife's throat and strangling her until she was dead. That establishes premeditation. See, *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983); *State v. Worley*,

178 Neb. 232, 132 N.W.2d 764 (1965). I therefore concur in the result reached by the majority.

COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEE, V. LYRIC COMPANY, INC., APPELLANT.

397 N.W.2d 32

Filed December 5, 1986. No. 85-960.

Employment Security Law: Independent Contractor. For the purpose of determining unemployment tax liability, the common-law definition of an independent contractor is superseded by the definition found in Neb. Rev. Stat. § 48-604(5) (Reissue 1984).

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed.

Lisa C. Lewis of Byrne, Rothery, Lewis, Bedel & Tubach, for appellant.

Jerry D. Slominski, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal from the Lancaster County District Court. The appellant, Lyric Company, Inc., was assessed unemployment taxes from September 1, 1983, through June 30, 1984. The unemployment insurance tax administrator found that Lyric did not meet the requirements for exemption from the payment of taxes set out under Neb. Rev. Stat. § 48-604(5) (Reissue 1984). Lyric appealed to the Nebraska Appeal Tribunal, which reversed the finding of the Department of Labor, holding that Lyric did meet the requirement for exemption from the payment of unemployment taxes. The Department of Labor appealed the decision of the Nebraska Appeal Tribunal to the Lancaster County District Court, which reversed the decision of the appeal tribunal and reinstated the decision of the Department of Labor. Lyric now appeals the decision of the Lancaster County District Court.

Lyric Company, Inc., is a wholesale costume jewelry and ladies' accessory business located in Omaha. Lyric has a local showroom and does some local business, but most of its business is done outstate as well as out of state by salespeople. The territories are fixed by Lyric for its sales staff and consist of a 300-mile area distant from the salesperson's focal point. The salespeople are hired in response to newspaper ads and are usually experienced, although they seldom have experience in the sale of jewelry. Lyric provides each salesperson with a set of samples, which remains the property of the company, and a list of customers in his or her territory. Lyric will, at the request of the salesperson, contact potential customers initially. Subsequent to the first season, the salesperson will be responsible for contacting customers and making appointments. No training or instruction is provided by Lyric.

Lyric does not require that its salespeople sell only its products. Salespeople may, and do, sell other products. Lyric places no limits upon the type of product which may be sold, and would permit its salespeople to sell jewelry or other ladies' accessories. The salespeople work out of their homes, and work on a straight commission basis. Limited amounts will be advanced on their commissions throughout the season. Should a customer fail to pay for an order, the commission of the salesperson will be reduced accordingly.

Lyric's business is seasonal. The first season runs from the first of January through the third week of April. The second season runs from the first of July through the second week in November. The samples are returned to Lyric at the end of each season, and the salespeople are provided with another set of samples at the beginning of the next season. Between seasons the salespeople are free to do whatever they want. The relationship may be terminated at any time by either party. If Lyric is unhappy with the performance of a salesperson, it simply will not provide that person with a new set of samples at the start of the next season. Lyric does not provide cars, gas, or any other expense. No taxes are withheld, nor is insurance paid by Lyric.

The appellant's assignments of error can be summarized as follows. First, that the district court failed to find that the

appellant, the Lyric Company, met parts A and C of the "ABC test" as set out in § 48-604(5). Secondly, the district court failed to follow the case of *State v. Saville*, 219 Neb. 81, 361 N.W.2d 215 (1985), which found that the ABC test can still be met despite the legislative narrowing of the exception. Finally, appellant finds error in the district court's refusal to limit the payment of unemployment taxes after February 11, 1984, the date on which the amended § 48-604(5) became effective.

Before we address the appellant's assignments of error, we note that in *Saville* we confined our analysis to the statutory definition set out in § 48-604(5). Here, too, we will adhere to the statutory definition, in view of the Legislature's statement that "[t]he provisions of this subdivision are not intended to be a codification of the common law and shall be considered complete as written."

Appellant's first assignment of error involves the failure of the district court to find that Lyric met parts A and C of the ABC test for exemption from unemployment taxes as set out in § 48-604(5). This statute defines what constitutes an independent contractor, as follows:

> Services performed by an individual for wages shall be deemed to be employment, unless it be shown to the satisfaction of the commissioner that (a) such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact, (b) such service is either outside the usual course of the business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed, and (c) such individual is customarily engaged in an independently established trade, occupation, profession, or business. The provisions of this subdivision are not intended to be a codification of the common law and shall be considered complete as written.

The Department of Labor concedes that part B of the test is met by the appellant; therefore, we may confine our analysis to parts A and C.

The two cases which are most clearly applicable to this case

and are relied heavily upon by the parties to this appeal are the cases of *State v. Saville, supra*, and *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983). The independent contractors in *Saville* were retained by the Department of Social Services. These "service providers" were assigned to a recipient of the services by the Department of Social Services. The department retained no control over the method by which the services were performed, except to require that the work be done in a workmanlike manner. There, we found that part A of the ABC test had been met.

In the *Erspamer* case we also found that the salespeople in question were independent contractors. There, however, we used the common-law analysis in coming to our conclusion, which we now no longer use in view of the statutory definition set out by the Legislature as found in § 48-604(5). *Saville, supra.*

The cases from outside Nebraska cited to us by the appellant lend insight to its position. In *Industrial Com'n v. Farm and Home Food Service, Inc.*, 5 Ariz. App. 339, 426 P.2d 808 (1967), the salespeople involved were permitted to work for other companies, paid all of their own expenses, arranged their own financing, and could hire their own employees to sell the merchandise. Compare this case to the case of *Superior Cablevision v. Indus. Com'n*, 688 P.2d 444 (Utah 1984), in which the persons involved were clearly not independent contractors. Here, the relationship was contractual, weekly payment forms were required, and insurance was paid upon the installers. They were required to wear T-shirts bearing the company name and address and to drive a white van provided by Cablevision.

The district court in the instant case held that part A had not been met because the territory of the salespeople had been defined by Lyric and the prices were set by Lyric, and the district court found what it considered to be a de facto sales quota. We disagree, looking instead to the language of the administrative law judge who heard this case on appeal to the Nebraska Appeal Tribunal, with reference to part A:

> A finding of "independent contractor" status must be supported by three findings. The first test is "control".

> An independent contractor must be free from control both contractually and in fact. Lyric Company, Inc. did not exert an employee's [sic] control over these salespeople. The salespeople had no set hours, no set duties, no reporting responsibility, and very little instruction and training. They were left to sell or not sell, to exert effort or not, as they determined.

We disagree with one aspect of the appeal tribunal's analysis, in that we can find no evidence in the record of *any* training or instruction provided by Lyric to its employees. We find that the lack of control exerted by Lyric over its salespeople in light of the above-cited case law places them well within part A.

Moving next to part C of the ABC test, we note that the record makes apparent that the Lyric salespeople were permitted to work for whomever else they wanted. The record reveals that the Lyric salespeople did in fact sell goods other than those sold for Lyric.

The district court relied upon the following definition of part C as rendered by the Vermont Supreme Court in the case of *In re Bargain Busters, Inc.*, 130 Vt. 112, 119, 287 A.2d 554, 559 (1972):

> "The adverb 'independently' clearly modifies the word 'established', and must carry the meaning that the trade, occupation, profession or business was established, independently of the employer or the rendering of the personal service forming the basis of the claim. The present tense 'is' indicates the individual must be engaged in such independent activity at the time of rendering the service involved. . . ."

From this language the district court concluded that Lyric did not meet part C of the ABC test. It stated:

> It does not contemplate a case such as the present one where the business itself exists only by virtue of a contract drawn up by the company. It would be possible for a jewelry salespeson [sic] to be customarily engaged in an independently established business if he obtained the jewels from several different sources with no strings attached. Here, however, the salespersons did not even get possession of the goods, but instead forwarded orders of

the defendant, Lyric Company, Inc. . . . .

The district court appears to interpret § 48-604(5) somewhat differently than we have interpreted the section in the past. In *State v. Saville*, 219 Neb. 81, 87, 361 N.W.2d 215, 220 (1985), with reference to part C, we stated:

> And, finally, part C provides that "such individual is customarily engaged in an independently established trade, occupation, profession, or business." Oldfield may work exclusively for welfare recipients or may work in part for welfare recipients and in part for others. But with the simple restriction that Oldfield may not subcontract the work, there are no other restrictions as to how many "employers" she may have. Moreover, we are impressed by the fact that Welfare provides nothing to this individual, either by way of equipment or benefits, except the payment for services billed to Welfare, much in the same way as Welfare pays all other vendors of goods and services.

The facts of this case would fall well within the *Saville* interpretation; as we stated earlier, the salespeople were able to work for whomever else they pleased and, as in *Saville*, were provided with no benefits or aid from Lyric.

Finding that parts A and C of the ABC test are met, along with the parties' conclusion that part B is met, we find that Lyric's salespeople are independent contractors under the ABC test set out in § 48-604(5). In view of this finding we need not address the appellant's second and third assignments of error. We reverse.

REVERSED.

MICHAEL D. VITOSH, APPELLANT, V. CLARA M. VITOSH, APPELLEE.

397 N.W.2d 35

Filed December 5, 1986. No. 86-072.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

James G. Sharp of Everson, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellant.

James M. Kelley of Professional Legal Associates of Nebraska, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Michael D. Vitosh appeals a judgment of the district court for Gage County authorizing his former wife, Clara, to remove their daughter from the state and denying his application for a reduction in child support.

We have reviewed the record de novo, as we are required, to determine whether the district court abused its discretion. See, *Maack v. Maack*, 223 Neb. 342, 389 N.W.2d 318 (1986); *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986). Our review leads us to the conclusion that the district court did not abuse its discretion, and therefore the judgment entered by the district court should be affirmed.

The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF P.W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. R.W. AND G.W., APPELLANTS.

397 N.W.2d 36

Filed December 5, 1986. No. 86-177.

Appeal and Error. Where the appellant's brief assigns no error or fails to make references to the record, the judgment of the lower court will be affirmed, absent any plain error the Nebraska Supreme Court may note.

Appeal from the Separate Juvenile Court of Sarpy County: WILLIAM D. STALEY, Judge. Affirmed.

Charles M. Meyer, for appellants.

Patrick Kelly, Sarpy County Attorney, and Lawrence D. Gendler, for appellee.

Lyn Ferer and, on brief, Deborah S. Ortman, guardians ad litem.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The separate juvenile court adjudged the subject 15-year-old to be within the purview of Neb. Rev. Stat. § 43-247(3)(a) and (b) (Reissue 1984) and placed her care and custody in and with the Department of Social Services. The brief filed in this court by the appellant parents fails to make specific assignments of error as required by Neb. Rev. Stat. § 25-1919 (Reissue 1985) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). The brief further fails to make any references to the record as required by Neb. Ct. R. of Prac. 9D(1)f (rev. 1986). Under either of those circumstances, the judgment of the lower court will be affirmed, absent any plain error this court may note. *Leisy v. Lisco State Bank,* 223 Neb. 946, 395 N.W.2d 517 (1986); *State v. Eckstein,* 223 Neb. 943, 395 N.W.2d 515 (1986). Accordingly, the judgment of the separate juvenile court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH P. MONIZ, APPELLANT.

397 N.W.2d 37

Filed December 5, 1986. No. 86-186.

1. **Criminal Law: Appeal and Error.** The factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.
2. **Homicide: Self-Defense.** One who knows he or she may retreat with complete safety may not resort to the use of deadly force in self-defense.
3. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the trier of fact, and a finding made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
4. _____: _____. A finding of guilt may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if that evidence sustains some rational theory of guilt.
5. **Homicide: Evidence: Proof.** In second degree murder cases malice and intent may be inferred from the evidence relating to the circumstances of the criminal act.

Appeal from the District Court for Thurston County: DARVID D. QUIST, Judge. Affirmed.

S.J. Albracht, for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

Following a bench trial, defendant, Joseph P. Moniz, was found guilty of second degree murder in violation of Neb. Rev. Stat. § 28-304 (Reissue 1985) and sentenced to life imprisonment. His three assignments of error raise two issues: (1) whether the killing was justifiable as having been committed in self-defense; and, if not, (2) whether the evidence supports a conviction for second degree murder. We affirm.

Defendant testified that he, an unemployed, disabled man suffering from back problems and emphysema, and decedent, Gerald Jump, a younger, robust individual, had been longtime

friends and had been standing at the bar of the Horseshoe Lounge in Walthill visiting and buying each other drinks. All at once decedent turned to defendant and said, "You ugly Son-of-a-Bitch, I'm going to whip you." Decedent continued "picking" on defendant and bragged about how he had "whipped" defendant's son and could "whip" any of the Monizes. Defendant then rejoined his daughter, Tracy Moniz, her boyfriend, Fred Appleton, and defendant's nephew, Frank Stabler, at a booth. Decedent went over to the booth on three separate occasions, "cussing" and "laughing" at defendant and sticking his fingers into defendant's drink. While this caused defendant to stand up so as to face decedent, there was no hitting or pushing, and defendant and Stabler ultimately left the lounge. However, because defendant had left the keys to his car at the booth, he beckoned through the picture window at the front of the lounge to his daughter to come outside so that he could retrieve his keys.

Once at home, defendant and Stabler decided they wanted more beer, so they drove back to the lounge. Although defendant expected no more trouble because he thought decedent would have left the lounge by that time, he nonetheless asked Stabler to go in the lounge and get the beer while he remained in the car. Decedent and his friend, Mark Morgan, then came out of the lounge. Decedent started toward defendant while defendant was still in the car, but Morgan pulled decedent back onto the sidewalk. Defendant, who had by this time gotten out of his car, was struck about the head several times by decedent. Becoming afraid decedent, who had a reputation for being a mean fighter, was going to cripple him, defendant took out his knife, an instrument with a 4- to 5-inch locking blade, and "just started cutting."

There was other evidence, however, from which the trier of fact could find that all was peaceful in the lounge for approximately 30 minutes after defendant returned to the booth. Defendant and decedent then began to argue with each other across the room. Decedent went over to defendant's booth at least twice, during which encounters some shoving occurred. The bartender, Donald French, his nephew, Tim French, and Morgan attempted to separate defendant and

decedent and stop the argument. Finally, at approximately 11 p.m., the bartender asked defendant to leave. By this time defendant and decedent had been at the lounge approximately 5 hours.

Once outside the lounge, defendant, as he passed in view of the large picture window in the front of the lounge, made a motion with his hands toward someone, presumably decedent, which suggested that defendant wanted decedent to come outside. No one responded, except that Tim French went outside to again ask defendant to leave because he did not want any more trouble at the lounge. French further testified that at this time defendant replied that there was going to be trouble because he was going to "gut" decedent. Defendant then walked toward his home, while decedent remained in the lounge and continued to drink.

Approximately 30 to 40 minutes later, defendant's son, "Young Joe" Moniz, went into the package area of the lounge. Tim French testified that Young Joe wanted decedent outside for a fight but that French restrained Young Joe from entering the bar area. By this time defendant and Stabler had returned in defendant's car and parked outside the lounge.

Decedent finished his drink, took off his glasses and possibly his hat, laid them on the bar, and started for the door. Decedent stated he was "going to have to take care of this matter." Morgan and the Frenches attempted to keep decedent from leaving the lounge, but decedent said he was going home and that they could not stop him from doing that. Morgan accompanied decedent as he left the lounge, and the bartender called the police.

A fight involving decedent, defendant, Morgan, Stabler, and Young Joe then began outside the lounge. The Frenches and Morgan testified that as decedent and Morgan exited the lounge, both defendant and Stabler got out of the car and started toward the two men. Although all of the men were bunched together in the scuffle, the first "challenge" appeared to have been between Young Joe and decedent. Defendant was struck on the face by decedent, perhaps as the result of defendant's stepping in front of a punch intended for Young Joe. Defendant then grabbed decedent by the collar and shoved

him toward a wall.

At some point in the scuffle defendant pulled out his knife. According to Morgan, defendant repeated two or three times to decedent, "I'm going to gut you," and when Morgan tried to take the knife from defendant, defendant repeated the same to Morgan. Decedent had no weapon. Morgan saw defendant strike decedent three times in the face with the knife. Defendant may also have stabbed decedent in the stomach. At some point after decedent had been cut, he uttered something to the effect, "This is not funny, Joe, quit it, I can hurt you too," or "You think that is funny, huh?" Finally, decedent fell into the doorway of the building.

Morgan testified that after decedent fell, Young Joe stated, "It is over with now." Defendant and Stabler then got into defendant's car and drove away.

Decedent died from the loss of blood which resulted from three stab wounds in the left chest, one stab wound beneath the right rib margin, and one stab wound in the back. Decedent also suffered face lacerations. Defendant suffered face abrasions and a cut inside his lower lip.

The sheriff testified that, in discussing the matter with him following his arrest, defendant admitted he had stabbed decedent and that he knew he had done wrong and had to pay for it. Defendant also told the sheriff that he was in his car when the decedent "started in" on him and that he asked decedent to leave him alone. When the decedent "popped him" in the mouth, defendant warned decedent he would "cut him."

The first issue, whether the killing was justifiable self-defense, rests upon Neb. Rev. Stat. § 28-1409 (Reissue 1985), which provides in part:

> (1) Subject to the provisions of this section and of section 28-1414, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> . . . .
>
> (4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is

> necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat, nor is it justifiable if:
>
> . . . .
>
> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating . . . .

In reviewing this matter we must bear in mind that the factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong. See, *State v. Williams, ante* p. 114, 396 N.W.2d 114 (1986); *State v. Goodon,* 219 Neb. 186, 361 N.W.2d 537 (1985); *Bordeau v. State,* 125 Neb. 133, 249 N.W. 291 (1933).

Defendant's own version of the occurrence provides ample basis for the trial judge's conclusion that the killing was not justifiable self-defense. Defendant himself testified that he was in his car when he saw decedent start toward him. Defendant also saw decedent being pulled back by Morgan, knew that he and decedent had spent 5 hours arguing with each other, and by his own words knew decedent was a mean fighter. Defendant also knew he could avoid the necessity of using force with complete safety by retreating as contemplated by § 28-1409(4)(b). All defendant would have needed to do to retreat was to lock and remain in his car or to drive away.

In a similar case, *State v. Kuntzelman*, 215 Neb. 115, 337 N.W.2d 414 (1983), this court concluded it was not error to refuse to instruct the jury as to the elements of self-defense. In *Kuntzelman* the victim and his companions had been harassing the defendant and a group of his companions. During the chain of events leading to the killing, the defendant and his friends had locked the doors of the van in which they were traveling and had fled from the victim and his friends. After concluding that another friend had been left behind and might be in danger, the defendant secured a shotgun and returned with the others to the earlier scene. The victim and his companions were still at the scene. The defendant discharged the shotgun twice into the air and shouted "get out of here." The victim then began advancing on the defendant, stating, "You haven't the courage to shoot me." Defendant proved the victim wrong by shooting him from a distance of 12 to 14 feet. In reaching its decision this court

relied in part on the fact that the defendant could have retreated to the safety of his van.

Since there is evidence to support a factual finding that defendant knew he could avoid the necessity of using force with complete safety by retreating, the trial judge's conclusion with respect to the first issue is not clearly wrong, and, thus, that issue is resolved adversely to defendant.

In connection with the remaining issue, defendant argues that while the evidence may establish he committed manslaughter, it falls short of establishing he committed murder in the second degree.

Section 28-304 provides that one commits murder in the second degree if he or she "causes the death of a person intentionally, but without premeditation." Neb. Rev. Stat. § 28-305 (Reissue 1985) provides that one commits manslaughter if he or she kills another "without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act."

In making our analysis we are guided by the principle that in determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the trier of fact, and a finding made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Kern, ante* p. 177, 397 N.W.2d 23 (1986); *State v. Baker, ante* p. 130, 395 N.W.2d 766 (1986); *State v. Borchardt, ante* p. 47, 395 N.W.2d 551 (1986). Further, a finding of guilt may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if that evidence sustains some rational theory of guilt. See, *State v. Kern, supra; State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985). Thus, we concern ourselves not with whether the evidence would have supported a conviction for manslaughter but whether it supports a conviction for the degree of murder the trial judge as the trier of fact found to exist.

We have held that the essential elements in the crime of murder in the second degree are that the killing be done

purposely and maliciously. *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983). Malice, in the context of second degree murder, has been said to denote that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse, *State v. Rowe, supra*, and to be " 'any willful or corrupt intention of the mind.' " *Housh v. State*, 43 Neb. 163, 168, 61 N.W. 571, 572 (1895).

In arguing that the evidence fails to show the killing of the decedent to have been purposeful and malicious, defendant overlooks the fact that these elements may be inferred from the evidence relating to the circumstances of the criminal act. See, *State v. Rowe, supra; State v. Clermont*, 204 Neb. 611, 284 N.W.2d 412 (1979).

There is evidence that defendant made a conscious decision to "gut" decedent and did precisely that. That circumstance alone supports the conclusion that the killing was the intentional result of defendant's willful act of attacking decedent with a knife. Thus, the evidence supports a finding that the killing was done purposely and maliciously.

The judgment and sentence of the district court are therefore affirmed.

AFFIRMED.

GRANT, J., dissenting in part.

I agree with the holding of the court that defendant's act of killing was not justifiable as self-defense. I dissent from the holding of the court affirming the trial court's determination that defendant's act constituted second degree murder.

This court has stated that " 'malice and intent may be inferred from the evidence relating to the circumstances of the criminal act.' " *State v. Rowe*, 214 Neb. 685, 690, 335 N.W.2d 309, 313 (1983). The malice sufficient to support a finding of guilt in the second degree murder in the *Rowe* case was shown by the victim's fractured skull, a potentially lethal injury, which, however, did not cause death because the victim (Rowe's wife) bled to death from a large incision from below the breastbone to the pubic area and the partial amputation of the victim's left breast.

In *State v. Partee*, 199 Neb. 305, 258 N.W.2d 634 (1977), cited in *State v. Rowe, supra*, a conviction of murder in the

second degree also was affirmed. In *Partee* the finding of defendant's malice was based on the fact that the victim (the wife of Partee) was "brutally and relentlessly beaten, and part of her scalp was torn away." 199 Neb. at 312, 258 N.W.2d at 639.

In this case the relationship of defendant and decedent as friends disintegrated, after 5 or 6 hours of drinking, into a drunken brawl resulting in this senseless killing. In my opinion, as a matter of law, the 62-year-old debilitated defendant displayed no more "malice" toward the 31-year-old robust decedent than that displayed by any participant in such an unevenly matched brawl or "sudden quarrel." Defendant did not display malice which would warrant a conviction of second degree murder.

In my opinion defendant was guilty of the crime of manslaughter and should have been sentenced accordingly.

STATE OF NEBRASKA, APPELLEE, V. JAMES A. DAVIS, APPELLANT.
397 N.W.2d 41

Filed December 5, 1986. Nos. 86-291, 86-292.

1. **Trial: Evidence: Stipulations: Waiver.** An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted, so that the one party need offer no evidence to prove it and the other is not allowed to disprove it.
2. _____: _____: _____: _____. A concession or stipulation as to a fact made for the purpose of trial has the force and effect of an established fact, binding on the party making the same as well as on the court, unless the court in its reasonable discretion allows the concession to be later withdrawn, explained, or modified if it appears to have been made by improvidence or mistake.
3. _____: _____: _____: _____. Parties are bound by stipulations voluntarily made, and relief from such stipulations after judgment is warranted only under exceptional circumstances.
4. _____: _____: _____: _____. An accused may by stipulation waive the necessity of proof of all or any part of the case which the State has alleged against him and having done so, he cannot complain of evidence which he has stipulated into the record.

Appeal from the District Court for Furnas County: JACK H. HENDRIX, Judge. Affirmed.

Frank Shoemaker, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

The appellant, James A. Davis, was charged in two separate informations with receiving or retaining stolen movable property belonging to another and having a value of more than $1,000, in violation of Neb. Rev. Stat. § 28-517 (Reissue 1985). The property in case No. 86-291 consisted of seven head of Holstein calves, while the property in case No. 86-292 consisted of a stock trailer. The sole issue as presented to us in this appeal by Davis is whether the property seized in each of the cases was obtained as a result of an illegal search and seizure in violation of Davis' rights under U.S. Const. amend. IV or Neb. Const. art. I, § 7. While our review of the record causes us to believe that the property was not illegally seized, because of action voluntarily taken by Davis at trial, we need not reach that issue in affirming the conviction and sentence.

During the week of June 4, 1984, 17 hogs and a stock trailer were stolen from a site in Phillips County, Kansas. The sheriff of Harlan County, Nebraska, received information to the effect that Davis had brought two of the stolen hogs into Orleans, Nebraska, to be butchered. On June 12, 1984, the sheriff contacted a member of the Nebraska State Patrol and relayed the information to him. On June 14, 1984, another member of the Nebraska State Patrol advised that he had driven past a farm located near Hendley, Nebraska, and had seen a blue stock trailer. The Nebraska State Patrol then contacted the sheriff of Furnas County, Nebraska, and advised him that there was a blue stock trailer located on property occupied by Davis and asked the sheriff to conduct a further investigation. The Furnas County sheriff drove west along the county road, past the Davis property. As he did so, he observed the trailer. He

turned around and parked on the side of the county road. Using a spotting scope to look for markings, he noticed there was no license plate on the trailer. He then pulled into the driveway and walked around to the east side of the house to where children were playing. He asked them if their parents were home, and, when they responded they were not, he walked around to the north side of the house. He then proceeded to the northwest, where he checked the trailer for identifying marks. Mrs. Davis then arrived. He told her he was "checking" the trailer because he believed it was stolen. The sheriff testified that Mrs. Davis disclaimed any knowledge of the trailer and told the sheriff to "do whatever [he] had to do."

The sheriff of Phillips County, Kansas, was summoned and asked to drive to the location in order to identify the trailer, which, by that time, had been pulled out near the road. When the sheriff of Phillips County, Kansas, arrived, he checked the trailer and, while doing so, mentioned to the Furnas County sheriff that calves in the fenced-in area in the southeast corner of the property were similar to those reported stolen in Kansas. The Furnas County sheriff informed Mrs. Davis that he was taking the trailer and that he would be back the next day because he believed the calves were stolen and he wanted the owner to identify them. He also testified that he asked Mrs. Davis if he could take the trailer and that she said he "could go ahead and take it because she had no knowledge of it."

On the following day the sheriff returned, accompanied by the Kansas sheriff, a brand inspector, and the owner of the calves. The Furnas County sheriff told the others to wait by the road while he went to the house and spoke to Mrs. Davis. He asked for permission to search. She asked what rights she had. He explained that she did not have to let them search; that he could get a search warrant. Following their conversation, Mrs. Davis signed a form granting the sheriff permission to search the property. The calves were then identified by the owner and taken from the premises. Davis was subsequently arrested and charged with each of the crimes.

On December 9, 1985, Davis appeared with counsel in the district court for Furnas County, Nebraska, and voluntarily waived trial to a jury. The charges in another case, involving the

theft of a lawnmower and a Rototiller, were dismissed, and the two remaining charges involved in this appeal were tried to the court.

Davis, through his counsel, renewed a motion to suppress which had previously been overruled by the district court. The court, once again, overruled the motion to suppress, and the case proceeded to trial on a stipulation of facts. None of the property seized was offered in evidence, but Davis did *stipulate* in open court that he had received the property identified, that the property had been stolen, that he knew the property was owned by others and was stolen, and that he lacked the intent to restore the property to its rightful owners. He further stipulated that the value of the property in each case was more than $1,000.

Specifically, in case No. 86-291 Davis stipulated that he "received the seven Holstein calves owned by Marvin VandeerVeen [sic] with the knowledge or belief that said seven Holstein calves were stolen and that James A. Davis lacked the intent to restore the Holstein calves to the said Marvin VandeerVeen [sic]." In case No. 86-292 he specifically stipulated that he "received the stocktrailer owned by Leo Goodale with the knowledge or belief that said stocktrailer was stolen and that James A. Davis lacked the intent to restore the stocktrailer to the said Leo Goodale." Additionally, he stipulated that the owners of the property identified the property which had been removed from their respective premises without their consent or permission.

As we have already indicated, we believe that the search and seizure can be held valid on a number of various grounds. We do not, however, reach that question in light of the record presented to us. Davis, having stipulated in open court, without objection, to all of the relevant facts necessary to convict him of the crimes charged cannot now claim error.

Based upon the stipulation made to the court, a prima facie case was made in each of the actions then pending before the court. There was nothing more for the court to do than to find Davis guilty of both charges. His guilt, however, was based upon the stipulation of facts and not upon any evidence acquired by reason of the alleged illegal search and seizure. As

noted by the eminent authority Wigmore in his work on evidence:

> An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it and the other is not allowed to disprove it.

9 J. Wigmore, Evidence in Trials at Common Law § 2588 at 821 (J. Chadbourn rev. 1981). And in 31A C.J.S. *Evidence* § 381 at 923 (1964), the author notes:

> A concession or stipulation as to a fact made for the purpose of trial has the force and effect of an established fact binding on the party making the same, as well as on the court, unless the court in its reasonable discretion allows the concession to be later withdrawn, explained, or modified if it appears to have been made by improvidence or mistake.

None of the exceptions, of course, are applicable in the instant case.

This general authority is in accord with the law in this jurisdiction. In the case of *State v. Wells*, 197 Neb. 584, 249 N.W.2d 904 (1977), the petitioner appealed from a determination on an annual review that petitioner was still a sexual sociopath as defined by the law then in existence. In particular, he assigned as error evidence regarding a 1953 rape which he had earlier stipulated to during trial. In rejecting the argument we said at 591, 249 N.W.2d at 908:

> There is a compelling reason to uphold the 1953 rape conviction, if it were an issue herein, without further argument. Defendant's retained counsel in open court stipulated to that conviction when attention was called to the definition of a sexual sociopath in section 29-2909, R.R.S. 1943.

Although Davis had earlier reserved his objection to the court's ruling on his motion to suppress, when the court again overruled his motion at trial, he stipulated without objection to the facts upon which the conviction was based. He cannot have

it both ways. He cannot, on the one hand, admit to the facts and, on the other hand, maintain that the court should not have considered the facts. Such stipulations are binding on the parties.

In *Martin v. Martin*, 188 Neb. 393, 398, 197 N.W.2d 388, 391 (1972), we said: "Parties are bound by stipulations voluntarily made and relief from such stipulations after judgment is warranted only under exceptional circumstances."

Even if we were to hold that the search violated Davis' fourth amendment rights (which we do not do), we would be unable to afford Davis any relief in view of the fact that he was convicted not upon the evidence seized but, rather, upon his own voluntary stipulation as to the facts.

The Illinois Supreme Court, in a case not dissimilar to the instant case, reached a similar conclusion. In the case of *The People v. Hare*, 25 Ill. 2d 321, 324, 185 N.E.2d 178, 179 (1962), the court said:

> This court has held that an accused may by stipulation waive the necessity of proof of all or any part of the case which the People have alleged against him and that having done so, he cannot complain in this court of evidence which he has stipulated into the record. (*People v. Polk*, 19 Ill.2d 310; *People v. Pierce*, 387 Ill. 608; *People v. Malin*, 372 Ill. 422.)

A case nearly on point with the instant case is *People v. Sanders*, 55 Ill. App. 3d 178, 370 N.E.2d 1213 (1977). In the *Sanders* case the defendant was charged and convicted of armed robbery. Prior to trial, a hearing was held on his motion to suppress certain statements which he had made while in custody following his arrest. The motion was overruled, and the parties proceeded thereafter to trial. At the trial Sanders' counsel informed the court that Sanders had entered into a plea negotiation with the State, in which certain of the charges would be dropped if Sanders pled guilty to certain other charges. Before, however, accepting the plea, the defendant inquired whether his entry of a guilty plea would terminate his right to appeal from the trial court's denial of his suppression motion. A recess was called in order to explore the problem. When court reconvened, it asked defense counsel whether he

had "something that will preserve [the defendant's] right to appeal." The defense counsel responded in the affirmative, indicating that he and the defendant had discussed the matter and agreed that the prosecutor could "tender an offer of proof to the court." The prosecutor then stated that he "would offer, and [he] understood that the defense will stipulate [to] the evidence presented at the defendant's preliminary hearing, also the evidence presented at the motion to suppress that we had last week." Also presented was the statement of facts which the prosecutor had recited a few minutes before the recess was called.

At this point defense counsel volunteered that the prosecutor was correct and that the defense would stipulate to the State's proof in the case, waive trial by jury, and allow the court to accept the stipulation and testimony at the earlier proceedings "as evidence."

On appeal Sanders raised the issue regarding the suppression of evidence. After review the court held that the evidence had been obtained in violation of Sanders' fourth amendment rights. Nevertheless, the court refused to reverse the conviction, saying in *People v. Sanders, supra* at 185, 370 N.E.2d at 1218:

> The general rule is that an accused "may by stipulation waive the necessity of proof of all or any part of the case which the People have alleged against him and that having done so, he cannot complain * * * of evidence which he has stipulated into the record." [Citations omitted.] To allow the defendant to escape the application of this rule on the record herein would enable him to avoid the effect of the stipulation which he agreed to make on two of the charges against him, while accepting the benefit of the State's agreement to dismiss the other two charges. This would be an incongruous and unacceptable result. [Citation omitted.] We therefore apply the rule that the defendant is bound on appeal by the stipulation which he freely and knowingly entered into at trial, and hold that any error by the trial court in failing to suppress the statement which the defendant gave the detectives, Bland and Fegan, could not have affected the outcome of the case as presented and was, therefore, harmless error beyond any reasonable

doubt.

To the same extent, we believe that, by stipulating to the facts, Davis has waived any alleged error, and we therefore affirm the convictions and sentences.

AFFIRMED.

LESTER H. KAHL, APPELLANT, V. TED FREDERICK, SR., APPELLEE.
397 N.W.2d 46

Filed December 5, 1986. No. 86-333.

1. **Damages: Evidence.** The plaintiff must present sufficient evidence to allow the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness.
2. **Courts: Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm.

Appeal from the District Court for Boyd County: EDWARD E. HANNON, Judge. Affirmed.

Thurman Gay of Strope, Gay & Krotter, for appellant.

Thomas M. Maher of Maher and Arendt, and Mark Kozisek of Palmer and Kozisek, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This case involves a controversy concerning a contract for the care and training of racehorses owned by the plaintiff, Lester H. Kahl, and placed in the care of the defendant, Ted Frederick, Sr.

In March 1984 the parties entered into a written contract which provided as follows:

> Agreement between ted Frederick & Les Khal [sic] owener [sic] of T.B. Horses to be trained by "me" & Bob assitant [sic] trainer Hauling to Nebr. all vet. Bills, shoeing

expenes [sic] on Hauling horses to race meets. Pro-rated Per Horse at 10 cents per mile. Fees are to be $10.00 Per Hd per day while at the ranch or $15.00 Per day at track Plus 10% of all Earnings. Stake race fees shall be Paid by Les. if "1" ted cripple more then [sic] three out of 15 head that are sound when brought to me we will not charge for those horses.

/s/OK L A Kahl /s/Ted Frederick
/s/Robert Frederick

On April 4, 1984, 12 horses were delivered to Frederick in Nebraska. Thirteen others were delivered on May 15, 1984. Following a disagreement over Frederick's June and July billings, Kahl refused to pay for any of the horses' training or maintenance subsequent to July 31, 1984.

After Kahl paid the July billing, nine of the horses in Frederick's possession were sent to a stud farm in Minnesota, at Kahl's direction.

On November 9, 1984, Rocket Pacer, a horse then in Frederick's possession, was destroyed after being injured in a race at Lincoln, Nebraska. On December 28, 1984, Frederick sent Kahl a certified letter demanding payment of $19,329.02, or the horses in Frederick's possession would be sold at public auction on January 21, 1985, in Platte, South Dakota.

The plaintiff then commenced this action to recover possession of the horses and damages for breach of contract. The case was tried to the court on the third amended petition, filed January 8, 1986, and an answer and counterclaim that does not appear in the record. At the end of the plaintiff's evidence, the trial court sustained the defendant's motion for a directed verdict as to the cause of action for breach of contract. At the close of the defendant's evidence, the trial court sustained the plaintiff's motion for a directed verdict as to the second cause of action of the counterclaim.

The trial court found that the plaintiff was entitled to relief on his first cause of action and that the defendant was entitled to recover $18,331.50 from the plaintiff.

The plaintiff has appealed and contends the trial court erred

in sustaining the defendant's motion for a directed verdict as to plaintiff's second cause of action.

The plaintiff alleged that in addition to the terms set out in the written agreement, there were certain oral agreements which the defendant had breached. The plaintiff sought $1 million in special damages as compensation for the death of Rocket Pacer, the horse which was destroyed, and general damages for the decrease in value of his horses due to the defendant's alleged breach of the contract.

In sustaining the defendant's motion for a directed verdict as to the second cause of action, the trial court stated:

> Well, in my opinion the person who agisters a horse is not the insurer of the horse, that there must be — you might debate on the standard of care required, but I don't think that just having moved a horse to Lincoln and assuming that it is wrongful would be the justification would impose liability for the death of the horse. That there is no proof of negligence. There is no proof of any other theory of liability and therefore I sustain the motion and direct the verdict in favor of the defendant and against the plaintiff on the second cause of action.

At the time the plaintiff rested and the motion for a directed verdict was sustained, the evidence consisted only of testimony by the plaintiff. A part of the plaintiff's burden was to introduce sufficient proof of damages to permit a recovery. The plaintiff must present sufficient evidence to allow the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness. *Lis v. Moser Well Drilling & Serv.*, 221 Neb. 349, 377 N.W.2d 98 (1985).

The only evidence as to damages introduced by the plaintiff related to Rocket Pacer, the horse that was destroyed after being injured in a race at Lincoln, Nebraska.

Although the plaintiff alleged that Rocket Pacer had a true market value of $1 million, no satisfactory evidence was presented on this issue. The closest the plaintiff came to giving an opinion on the horse's value was on cross-examination:

> Q. All right. And this is a horse that in your claim that you — you claim a $1,000,000.00 for apparently in the Petition, anyway, but you wouldn't even take a telephone

call on this so-called million dollar horse?

A. That has nothing to do with the value of the horse.

Later, in testimony on cross-examination about the horse's breeding, the plaintiff testified as follows:

Q. Okay. So this horse that you are saying is the greatest horse in the world, the greatest miler, you paid $3,500.00 (sic) for?

A. Yes.

Q. And you bred it to a $2,000.00 mare?

A. Yes.

Q. And all of a sudden the offspring is a $1,000,000.00 horse?

A. Nothing unusual about that.

No other witness was called to express an opinion as to Rocket Pacer's value.

Apart from the testimony on cross-examination, the plaintiff testified that Rocket Pacer was sired by "the fastest miler that ever ran." Further cross-examination showed that the highest the plaintiff had ever paid for a horse was $6,500. He also testified that one way to determine a horse's value is track performance, although "many horses are sold for over a million dollars that never ran at all because they have a full sister or a full brother who was a great horse." The plaintiff then went on to testify that Rocket Pacer was a full sister to a horse that finished last after breaking down in its first race.

On redirect the plaintiff testified pedigree is as important as winnings and that many yearlings without race records are sold for over $10 million strictly on the basis of pedigree. However, there is no support for an inference that Rocket Pacer was such a horse.

From this evidence the value of the horse was uncertain at best. For this reason the court did not err in directing the verdict against the plaintiff, as reasonable minds could draw but one conclusion, i.e., the evidence failed to show with reasonable certainty the extent of the plaintiff's damage.

"Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm." *Sommerfeld v.*

City of Seward, 221 Neb. 76, 80, 375 N.W.2d 129, 132 (1985).

From our review of the record we conclude that the trial court did not err in sustaining the defendant's motion for a directed verdict as to the second cause of action. The judgment is, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LOUIS J. LEE, APPELLANT.
397 N.W.2d 48

Filed December 5, 1986. No. 86-337.

1. **Constitutional Law: Appeal and Error.** There may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.
2. _____: _____. The only errors which require reversal of a cause are those prejudicial to the rights of the accused or which constitute the denial of a substantial legal right.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Affirmed.

Vincent M. Powers, for appellant.

Robert M. Spire, Attorney General, and William L. Howland, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

The appellant, Louis J. Lee, was charged by complaint in the county court for Saunders County, Nebraska, of driving while intoxicated, third offense, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984). This is a Class W misdemeanor.

At a pretrial conference held on February 4, 1985, the county court entered, in part, the following order: "Defense counsel is ordered to identify, in writing, not later than 5:00 P.M., March 11, 1985, all of his intended witnesses by name and address and

all of his intended exhibits." Lee filed an objection to the pretrial order, maintaining that the court "cannot compel defense counsel to identify in writing all of the intended witnesses by name and address and all of his intended exhibits, absence [sic] of any reciprocal discovery order. The present order violates the defendants [sic] right to a fair trial."

The county court overruled Lee's objection to the pretrial order, and the case was ultimately tried to a jury, which found Lee guilty of driving while under the influence of alcohol. A subsequent enhancement hearing was held, at which time it was determined that this was Lee's third offense. He was then sentenced to 60 months' probation, 90 days in jail, and his license revoked for 60 months. Lee thereafter appealed to the district court for Saunders County, Nebraska, where the conviction and sentence were affirmed. It is from that order which he now appeals to this court.

Lee raises but a single issue. He maintains that the county court violated his constitutional right against self-incrimination by requiring him to list all of his witnesses and exhibits prior to trial, absent any request by Lee for discovery pursuant to Neb. Rev. Stat. §§ 29-1912 to 29-1921 (Reissue 1985). Because of events which occurred subsequent to the court's order requiring Lee to disclose the names of his witnesses, we do not reach that issue.

The record establishes conclusively that Lee did not comply with the court order, nor was he in any manner prevented from calling any witness to testify because he had not earlier disclosed his witnesses' names. As a matter of fact, the record discloses that Lee offered no evidence at the trial in the county court, though he was invited to do so. At the close of the State's case, the following discussion occurred:

> MR. WAGNER: Your Honor, the state rests.
>
> THE COURT: The state rests.
>
> MR. POWERS: The defense rests.
>
> THE COURT: The defense rests. And you are resting without presenting evidence, correct?
>
> MR. POWERS: Yes, sir.

Even assuming that the order of the court requiring Lee to disclose the names of his witnesses violated his constitutional

rights (a matter we do not decide in light of the record), it cannot be said that the order constituted prejudicial error entitling Lee to relief. That is so because Lee neither complied with the order nor sought to introduce witnesses who were then not permitted to testify. He was in no way prejudiced by the earlier court order.

Neb. Rev. Stat. § 29-2308 (Reissue 1985) makes it clear that not all errors entitle the defendant to a new trial. Section 29-2308 provides in part:

> No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred.

The validity of such a statute was upheld by the U.S. Supreme Court in the case of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In doing so the U.S. Supreme Court said at 21-22:

> We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111. None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant

> and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

To the same effect see *Harrington v. California*, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969).

While we do not suggest for a moment that the issue as to whether the pretrial order entered by the court was proper is unimportant and insignificant, we do believe that under the facts in this case the issue becomes unimportant and insignificant. In view of the fact that Lee neither complied with the order nor was in any manner affected by the order, it is as if the order had not been entered. That is the fact which, for our purposes in this case, makes the issue unimportant and insignificant and not requiring reversal. As an example, in *State v. Packett*, 206 Neb. 548, 552, 294 N.W.2d 605, 608 (1980), we said:

> It is generally improper for counsel, during the pendency of a proceeding, to communicate with the judge as to the merits of the case. Code of Professional Responsibility, DR 7-110. It would appear that objections to, arguments about, or evidence affecting the limits of cross-examination ought to be made only in the presence of or after appropriate notice to opposing counsel. In this case, however, there is nothing in the record from which it may be reasonably inferred that prejudice resulted to the defendant. The record does not show that the defense was subsequently improperly restricted in either direct or cross-examination. The only errors which require reversal of a cause are those prejudicial to the right of the accused, or which constitute the denial of a substantial legal right.

And in the case of *State v. Goodloe*, 196 Neb. 381, 243 N.W.2d 69 (1976), the defendant was convicted of driving a motor vehicle while under the influence of alcoholic liquor and refusing to submit to tests. After the hearing in the county court, the county judge indicated a finding of guilty and inquired if defendant intended to appeal. It was made clear that if defendant were to forgo his right to appeal, he would be held guilty on only one of the two charges, but if he intended to appeal, he would be sentenced on both charges. While this was

obviously improper and a denial of the defendant's constitutional rights, we nevertheless affirmed the conviction, saying at 383, 243 N.W.2d at 70:

> This was an attempted bargaining as to the right of appeal and is conduct which tends to chill that right. Such conduct is beyond the power of the court and entirely improper. In this instance there is no prejudicial error as the defendant did appeal, had a trial de novo in the District Court, and was there resentenced. The error was harmless. See § 29-2308, R.R.S. 1943.

To the same extent in the instant case, Lee did not share any information with the prosecution because he chose to ignore the order; he was not prevented from calling witnesses, though he voluntarily elected not to present any evidence. The error, if any, was therefore clearly without prejudice and must be disregarded. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PETER WADE SUFFREDINI, APPELLANT.

397 N.W.2d 51

Filed December 5, 1986. No. 86-595.

1. **Pleas: Appeal and Error.** The withdrawal of a plea is a matter addressed to the discretion of the trial court, and the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion.
2. **Pleas.** A factual basis for a plea may be determined from the statements of the county attorney.
3. **Pleas: Sentences.** A sentencing judge is not required to inform a criminal defendant that a sentence which need not be imposed consecutively to any other may nonetheless, in the judge's discretion, be so imposed.
4. **Pleas.** After the entry of a plea of no contest but before sentencing, the trial court should allow a defendant to withdraw his or her plea for any fair and just reason, provided the prosecution would not be substantially prejudiced by its reliance upon the plea.
5. **Pleas: Sentences: Trial.** While a more severe punishment cannot be exacted because a defendant pleads not guilty and puts the State to the expense of a trial, a defendant nonetheless has no absolute right to a reduced sentence because he

saves the State the expense of going to trial.

6. **Sentences: Appeal and Error.** Absent an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Kent E. Florom, Lincoln County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

Defendant, Peter Wade Suffredini, pled no contest to second degree murder in violation of Neb. Rev. Stat. § 28-304 (Reissue 1985), to robbery in violation of Neb. Rev. Stat. § 28-324 (Reissue 1985), and to the use of a firearm to commit a felony in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1985). The trial court found defendant guilty on each count, scheduled a sentencing hearing, and ordered a presentence investigation. At the sentencing hearing defendant moved to withdraw his plea. The motion was denied, and defendant was sentenced to life imprisonment on the murder charge, to imprisonment for not less than 15 nor more than 45 years on the robbery charge, to be served consecutively to the sentence for murder, and to imprisonment for not less than 5 nor more than 15 years on the use of a firearm charge, to be served consecutively to the other two sentences. Defendant assigns as errors the trial court's (1) failure to permit him to withdraw his pleas and (2) imposition of sentences which are claimed to be excessive. We affirm.

Defendant was originally charged with first degree murder in violation of Neb. Rev. Stat. § 28-303 (Reissue 1985), with the use of a firearm to commit a felony, and with "Theft by Receiving, value over $1,000," apparently as a violation of Neb. Rev. Stat. § 28-517 (Reissue 1985). As the result of a plea bargain, the charges were amended, and defendant pled as stated earlier.

Before accepting the defendant's pleas, the county attorney,

upon the trial judge's inquiry, stated that on April 27, 1986, the body of Samuel Coker was found immediately outside the door of the men's restroom at a rest area along the Interstate in Lincoln County, Nebraska. The victim had been shot five times.

A witness at the scene told law enforcement officers that a man in his early 20s had recently left the area in an automobile bearing a California license plate. An automobile matching the description of the one given by the witness was found at a motel, and a license plate check revealed that it had been stolen. A check of the registration at the motel disclosed that a man matching the description given by the witness had checked into the motel that evening. Officers entered the room registered to defendant and found him there. They discovered shoes in the room with blood on them which matched that of the victim. The officers also found a .22-caliber pistol with a small amount of blood on it under the mattress of the bed on which defendant was lying. While the amount of blood on the gun was not sufficient to positively identify it as that of the victim, there was sufficient blood to demonstrate it was of the same type as the victim's.

Further investigation developed that the victim had possessed a personalized billfold, made by his sister, on which the name "Sam" had been imprinted, and that the victim had been paid shortly before he was killed and would have been carrying between $180 and $240. Defendant had $188 in his possession when he was found by the officers and had paid approximately $20 in cash for the motel room. The cashless personalized billfold was found in Lincoln County. Located beside the billfold were five spent cases for .22-caliber ammunition. The Nebraska State Patrol subsequently determined that the .22-caliber cases found alongside the billfold had been fired from the weapon found in defendant's possession.

Defendant told the court he did not contest any of the foregoing statements.

Defendant's argument in connection with his first assignment of error, that he should have been permitted to withdraw his no contest pleas, rests on five grounds, each of

which was specifically found not to exist by the trial court. In reviewing this assignment of error we bear in mind that the withdrawal of a plea is a matter addressed to the discretion of the trial court and that the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. *State v. Nearhood*, 223 Neb. 768, 393 N.W.2d 530 (1986).

The first ground asserted by defendant is that the pleas are not supported by the facts. Since there is no question but that a factual basis for a plea may be determined from the statements of the county attorney, *State v. Irish,* 223 Neb. 814, 394 N.W.2d 879 (1986), this assertion is without merit. The county attorney's uncontradicted recitation of the facts underlying the charges supports beyond a reasonable doubt the conclusions that defendant intentionally caused the victim's death as required for a violation of § 28-304, that defendant stole the victim's money by taking it through force, violence, or fear as required for a violation of § 28-324, and that defendant used a firearm to commit the foregoing felonies as required for a violation of § 28-1205.

Next, defendant asserts that he did not understand the ramifications of entering no contest pleas. The trial judge explained to defendant the elements the State was required to prove beyond a reasonable doubt in each crime charged and, by examining defendant, demonstrated that defendant understood the nature of the crimes with which he was charged, as well as his rights to the assistance of counsel, to confront the witnesses against him, to a trial by jury, and his privilege against self-incrimination. The possible penalties for each offense were read to the defendant, and, as we have already seen, there was a factual basis for the pleas. Thus, the arraignment at which the subject pleas were entered complies fully with the requirements of *State v. Irish, supra*. The record therefore establishes that defendant's no contest pleas were entered freely, intelligently, voluntarily, and understandingly.

Defendant's third ground rests on the claim that he did not understand that the sentences imposed on each count could be required to be served consecutively. It is to be noted that there is no requirement that a defendant be informed that a sentence which need not be imposed consecutively to any other may

nonetheless, in the sentencing judge's discretion, be so imposed. *State v. Irish, supra.* Whether a defendant has a right to be told of the mandatory consecutive nature of a sentence imposed for the use of a firearm to commit a felony, § 28-1205, need not be, and therefore is not, decided, for the trial judge did so advise this defendant. The trial judge carefully explained that while the murder and robbery sentences could, in his discretion, be imposed so as to run concurrently, they could also be made to "run one after the other," or "consecutively." The trial judge further explained that he, however, had no discretion but to impose the sentence on the use of a firearm charge so as to "run consecutive; in other words, after any sentence imposed" on the murder and robbery charges. Thus, the record once again gainsays defendant's claim.

Defendant's fourth ground is that the State made no concession in the plea bargain because it had "no case" of first degree murder. Not only does defendant not cite any authority which requires that a plea bargain be supported by a concession on the part of the State, but defendant's premise that he received no concession is wrong. One of the ways to commit first degree murder is to kill while in the perpetration of a robbery. § 28-303(2). The factual basis for the plea establishes beyond a reasonable doubt that such is exactly what happened. The penalty for first degree murder ranges from life imprisonment to death, Neb. Rev. Stat. §§ 28-105 (Reissue 1985) and 28-303; the penalty for second degree murder ranges from 10 years' imprisonment to life, §§ 28-105 and 28-304. Thus, the plea bargain removed the possibility that defendant would be sentenced to death. By any measure, that is no small concession, even if the State, under the original complaint, would have succeeded in proving only a Class I misdemeanor theft of more than $100 but less than $300 under the "Theft by Receiving" charge and thus subjected defendant to a maximum of 1 year's imprisonment on that count. Neb. Rev. Stat. §§ 28-106 and 28-518(3) (Reissue 1985).

As to the fifth and final ground in connection with the first assignment of error, defendant urges that the plea does not meet "the ends of justice." Such a claim is so vague and indefinite as to have no meaning. The controlling rule is that after the entry

of a plea of no contest but before sentencing, a court should allow the defendant to withdraw his or her plea for any fair and just reason, provided the prosecution would not be substantially prejudiced by its reliance upon the plea. *State v. Nearhood*, 223 Neb. 768, 393 N.W.2d 530 (1986); *State v. Dixon*, 223 Neb. 316, 389 N.W.2d 307 (1986); *State v. Copple*, 218 Neb. 837, 359 N.W.2d 782 (1984). As we have seen, defendant has not only not shown any "fair and just" reason to withdraw his plea, he has shown no reason at all. Under that circumstance it certainly cannot be said the trial court abused its discretion in refusing defendant's motion to withdraw his plea.

That brings us to defendant's second assignment of error, the claim that the sentence is excessive. Defendant argues that he should be treated leniently because he pled no contest. While it is true that a more severe punishment cannot be exacted because a defendant pleads not guilty and puts the State to the expense of a trial, *State v. Winsley*, 223 Neb. 788, 393 N.W.2d 723 (1986), a defendant nonetheless has no absolute right to a reduced sentence because he saves the State the expense of going to trial. See, for example, *State v. Copple, supra*, wherein defendant's no contest plea did not disturb this court's longstanding maxim that a sentence imposed within statutory limits will not be disturbed on appeal, absent an abuse of discretion. *State v. Cain*, 223 Neb. 796, 393 N.W.2d 727 (1986).

Although the 26-year-old defendant has not previously been convicted of a felony, there are New York warrants outstanding against him for grand larceny, forgery, and falsifying business records as the result of the theft and sale of his girlfriend's automobile. However, irrespective of defendant's past record, the crimes which are the subject of this review were sufficiently senseless, violent, and brutal to more than justify the sentences imposed.

Since defendant's assignments of error are not sustained by the record, the judgments and sentences of the district court are affirmed.

AFFIRMED.

IN RE INTEREST OF D.J., T.J., L.W., L.W., AND M.J., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. L.H.W., APPELLANT, AND S.J., APPELLEE.

397 N.W.2d 616

Filed December 19, 1986. No. 85-787.

1. **Parental Rights: Appeal and Error.** An order terminating parental rights is reviewed de novo on the record in this court.
2. **Parental Rights.** An order terminating parental rights must be supported by clear and convincing evidence, and the primary consideration in such cases is the best interests of the children.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Jarve L. Garrett of Garrett Law Office, for appellant.

Donald L. Knowles, Douglas County Attorney, and Elizabeth G. Crnkovich, for appellee.

Thomas C. Emery, guardian ad litem.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

This is an appeal from an order of the separate juvenile court of Douglas County terminating the parental rights of L.H.W. (hereinafter referred to as appellant) to T.J., M.J., L.W., and L.W. The juvenile court action concerned the following five children. D.J., the oldest child, a male, was born in 1974. M.J. is the youngest, a female, and was born in 1983. T.J., a male, was born in 1975; L.W., a female, was born in 1978; and L.W., a female, was born in 1979. S.J. is the natural mother of all five children. All parties agree that appellant is not the father of D.J. There is no dispute in the pleadings and the evidence that appellant is the father of T.J., L.W. (born in 1978), and L.W. (born in 1979). While the petition does not specifically allege that appellant is the father of M.J., some 5 months after the petition was filed, appellant stipulated that he was the father of M.J.

A petition was filed in December 1984 in the separate juvenile court of Douglas County. The petition alleged that S.J. was the natural mother of all five children; that all the children came within the definition in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982) because of the fault or habits of S.J., their mother; and that all the children came within the meaning of Neb. Rev. Stat. § 43-292(2) (Reissue 1984) because their mother had "substantially and continuously or repeatedly neglected said children, and refused to give said children the necessary parental care and protection . . . ."

The petition also alleged, in its original typewritten form, that T.J., L.W. (1978), and L.W. (1979) were children of appellant and were children within § 43-247(3)(a) by reason of the fault or habits of appellant and that T.J., L.W. (1978), and L.W. (1979) were children within § 43-292(4) because appellant, their natural father, "by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, conducts himself so as to be seriously detrimental to the health, morals or well-being of said children . . . ." At a time not shown by the record before us, the name of M.J. was inserted in the petition, in handwriting, in each of the general allegations concerning the status of the children with regard to appellant, thus alleging in amended form that M.J. was a child within the meaning of §§ 43-247(3)(a) and 43-292(4). The addition of the name of M.J. in those counts is explained by the fact that the court granted leave to add M.J.'s name to the status allegations of the petition. The juvenile court, however, did not grant the State's motion to add M.J.'s name to the prayer for termination of appellant's parental rights, nor was the petition so amended.

The prayer of the petition asked that the court make appropriate orders concerning the children; that the court terminate the parental rights of S.J. as to all the children; and that the court terminate the parental rights "between [appellant], natural father of [T.J., L.W. (1978), and L.W. (1979)], and [T.J., L.W. (1978), and L.W. (1979)]." The relief requested in the petition, as against appellant, did not mention M.J.

After preliminary matters were disposed of, adjudication

hearings were held on February 25, March 21, May 7, May 8, May 30, and June 19, 1985. At the conclusion of the adjudication hearings, the court found, by its order filed July 29, 1985, that S.J. was the natural mother of the five children; that appellant was the natural father of T.J., L.W. (1978), and L.W. (1979); that T.J., L.W. (1978), and L.W. (1979) were "children within the meaning of Section 43-247 (3a) and Section 43-292 (4) . . . Cum., Supp., 1982, insofar as their natural father, [appellant], is concerned." On September 24, 1985, the court entered its order terminating the parental rights of S.J. to all five children and terminating the parental rights of appellant to T.J., L.W. (1978), L.W. (1979), and M.J. S.J. did not appeal from this order; L.H.W. did appeal.

In this court appellant assigns six errors, which may be consolidated into three: (1) That the trial court erred in admitting the testimony of the minor children; (2) That the trial court erred in admitting into evidence the testimony of the police officers and the social workers, because such testimony was hearsay; and (3) That the court erred in finding that there was sufficient clear and convincing evidence to support the court's order terminating appellant's parental rights. We affirm the order of the juvenile court as to the oldest three children, T.J., L.W. (1978), and L.W. (1979). We reverse the order of the juvenile court as to the youngest child, M.J., and remand for further proceedings as to her.

We first note that an order terminating parental rights is reviewed de novo on the record in this court. *In re Interest of A.L.N.*, 223 Neb. 675, 392 N.W.2d 780 (1986). Where the evidence is in conflict, we give great weight to the fact that the trial court observed the parties and witnesses and judged their credibility. *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985). Such an order terminating parental rights must be supported by clear and convincing evidence, and the primary consideration in such cases is the best interests of the children. *In re Interest of A.L.N., supra.*

The record shows the following. S.J. had a long history of moving in and out of appellant's home. She always took her oldest child, D.J., and the baby, M.J., with her when she left, leaving the other three children in appellant's custody.

During one of her periodic stays with appellant, the mother informed the Omaha police on November 16, 1984, of her suspicions of sexual abuse of her daughter, L.W. (1979), by appellant. Officers investigated the report. As a result of the investigation, appellant was charged with three counts of first degree sexual assault. A preliminary hearing was held on these charges on December 10, 1985. At this hearing S.J. testified that L.W. (1978) and L.W. (1979) had told her, in detail, that appellant had assaulted each of the girls by sexual penetration and that D.J. had told her that appellant had made him perform sexual acts. At this hearing L.W. (1978) and D.J. each testified as to the sexual acts appellant had committed as to them. L.W. (1979) was called as a witness but did not respond audibly to any questions put to her by the county attorney or the court. At the conclusion of the hearing, appellant was bound over to district court for trial on two counts. The third count, apparently concerning L.W. (1979), was dismissed.

After the preliminary hearing S.J. told the lawyer representing appellant in the pending criminal case that she had lied to the police when she had first told them of appellant's sexual abuse of L.W. (1978) and that she had told the children to lie to the police and at the preliminary hearing concerning appellant's actions toward the children. Although the record is not clear, it appears that the criminal charges against appellant were dismissed without further action.

At the adjudicatory hearings in the juvenile court, D.J. testified that appellant had forced him to commit fellatio on appellant. T.J. testified he had witnessed one of the incidents in which D.J. was performing that act on appellant and that appellant had tied T.J. to a bed and whipped him with a belt. L.W. (1978) testified that appellant had placed his penis between her legs on many occasions and had done the same thing to L.W. (1979). L.W. (1979) testified to similar activities on appellant's part. Two police officers testified as to their investigation after S.J.'s first call to the police department concerning appellant's alleged sexual abuse of the children. Two social workers also testified as to their involvement in regard to the children. The physician who examined the children after S.J.'s first complaint about the sexual abuse of the children

testified that there was no evidence of abrasions or sexual penetration of the children, but testified that he did not have an opinion as to whether the children had been sexually abused. The doctor later testified that most sexual abuse of children can occur without sexual penetration.

Sharon Van Butzel, a hospital social worker, testified that she interviewed the mother, who said that the children had been sexually assaulted by the appellant.

Yolanda Herrera, a Child Protective Services worker, interviewed the children and the mother. Herrera testified that the mother told her that both L.W. (1978) and D.J. had said they were sexually abused by appellant, that the mother's relationship with appellant was frequently violent, that appellant had "busted her head with a bat" and had hurt the mother many times, and that appellant had tied the mother to a bed and beaten her with an electrical cord because she refused to go out and prostitute for him. Herrera testified that she talked with the four older children, who said they were afraid of the appellant. She further testified that D.J. told her that the appellant "did bad things to me like rape. He made me do things to him"; that T.J. told her he had been stripped, tied to a bed, and beaten and that he had observed his half-brother D.J. performing oral sex with the appellant; that L.W. (1978) had stated that the appellant humped her and she could not remember when he did not hump her; and that L.W. (1979) told her that the appellant "humped her and so did [D.J.]." The children's understanding of the word "humped" was set out in the record.

The appellant did not testify at the hearings. He was called as a witness but invoked his fifth amendment privilege. The thrust of his defense, as presented by his counsel, was that his children and their mother had fabricated the stories about sexual and physical abuse by the appellant.

At trial the four older children, then ages 10, 9, 6, and 5, were permitted to testify. Prior to the children's testimony, the trial court questioned each child to determine his or her ability to answer simple questions and to distinguish between the truth and a lie. Some of the testimony was inconsistent, but each child reported incidents of sexual or physical abuse by the

appellant.

S.J. was called as a witness by appellant. She testified to being a prostitute and to having sexual relations with her children D.J., L.W. (1978), and L.W. (1979). S.J. also testified that she had lied in her statements to the police and in the preliminary hearing on the criminal charges against appellant, and had coached the children to lie.

Regarding the first error assigned, appellant argues that the testimony of the children should not have been admitted into evidence because it was incompetent and inconsistent. The trial court determined after questioning each child that each was capable of answering simple questions and that each knew the difference between the truth and a lie. In our de novo review of that testimony, we conclude that each child responded satisfactorily, and all were competent to testify. Any inconsistency in the testimony of the children goes to their credibility as witnesses. The record does show that each child gave some inconsistent testimony about the incidents of sexual and physical abuse. There was testimony that the mother did tell the children what to say to the authorities when she reported the incident that initiated this action. However, the children also gave testimony of other sexual or physical abuse by appellant at times and places unrelated to this last occasion. Where the evidence is in conflict, we must give great weight to the fact that the trier of fact observed the parties and witnesses and judged their credibility. *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985). We find no error in the trial court's admission of testimony by the children.

The second error assigned was that the testimony of the police officers and social workers was hearsay and should not have been admitted into evidence. The trial court overruled appellant's objection to admission of the testimony and determined that the testimony qualified under the exception to the hearsay rule in Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 1985), which provides:

> (4) A statement is not hearsay if:
>
> (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with his testimony

> and is offered to rebut an express or implied charge against him or recent fabrication or improper influence or motive . . . .

The declarants in the instant case were the children and their mother, S.J. All testified at both the preliminary hearing and at the trial. They were all subject to cross-examination at the trial in the juvenile court. The testimony by the police officers and social workers was consistent with the testimony of the children and consistent with S.J.'s testimony prior to her recantation, and was offered to rebut the appellant's assertion that the children had recently fabricated their testimony. Under the circumstances in this case, it is clear that the statements about which Officers Sundermeier and Claussen and social workers Van Butzel and Herrera testified were admissible. *State v. Gregory*, 220 Neb. 778, 371 N.W.2d 754 (1985).

The last error assigned is that the court erred when it found that the State met its burden of proof by clear and convincing evidence. Appellant argues that the record is devoid of any clear and convincing evidence necessary to support the allegations in the petition. He claims that he was made a victim of a vicious plot by S.J. Appellant maintains that S.J. became a truthful witness after she recanted her original charges against him.

In our de novo review of the record, we find that the majority of the evidence contained in the five volumes of testimony is consistent with the allegations of sexual and physical abuse of the children by both parents. The testimony of the children is consistent that they were sexually abused by the appellant. The testimony of the police officers and social workers refutes the claim that the children were fabricating the allegations. Several witnesses testified to sexual activity between the children as well.

The record shows that S.J. is an admitted prostitute and that she had sexual relations with her children D.J., L.W. (1978), and L.W. (1979). Although S.J. has not appealed from the order terminating her parental rights, we feel it necessary to state that that order of termination of her parental rights is fully supported by clear and convincing evidence, most of which was admitted by S.J. Appellant suggests that this court reverse the order of the trial court as to him on the basis of the testimony of

S.J. at the time she changed her testimony at the adjudication hearing. As stated earlier, this court has said that where the evidence is in conflict, great weight is given to the fact that the trial court observed the parties and witnesses and judged their credibility. *In re Interest of M.L.B., supra.*

The record in this case leads us to the conclusion that the evidence clearly and convincingly establishes that there was sexual and physical abuse of the four older children by the appellant, and conduct by the appellant which was seriously detrimental to the health, morals, and well-being of all the children. The record also shows that these children have been subjected to one of the most unhealthy and unwholesome environments that people in our society could imagine and that appellant permitted such environment to exist. The best interests of the children in this case demand that the parental rights of the appellant be terminated. We believe that the decision of the separate juvenile court of Douglas County was correct and must be affirmed as to T.J., L.W. (1978), and L.W. (1979).

We turn now to consideration of the case as it affects the youngest child, M.J. The issues in this consideration have not been presented, but this court, at its option, may note plain error. *State v. Christiansen*, 217 Neb. 740, 351 N.W.2d 67 (1984). In the petition filed on December 6, 1984, the prayer for relief did not ask for the termination of parental rights between M.J. and the appellant. The record indicates that at the outset of this case, on two separate occasions the court stated that only three of the children were the natural children of the appellant. The fact that M.J. is also appellant's natural child came to light during the trial when appellant stipulated that he was M.J.'s father.

Although the petition was apparently amended (by the interlineation referred to above) to add allegations concerning her status with regard to appellant, the petition was never amended to conform to the evidence as to M.J.'s alleged parentage, nor was the petition amended to seek the termination of appellant's paternal rights to M.J. Additionally, the record does not disclose any evidence of sexual abuse of M.J., although obviously there was a great deal of evidence of

neglect by appellant.

At the conclusion of the adjudicatory portion of the hearing, the juvenile court made specific findings as to the status of all of the children with regard to S.J., and specific findings as to the status of T.J., L.W. (1978), and L.W. (1979) with regard to appellant. No such findings were made with regard to appellant and M.J., and, indeed, the testimony reflects little as to the relationship between M.J. and appellant.

The appellant has not been given any notice of an action to terminate his parental rights to M.J., as is required under Neb. Rev. Stat. § 43-291 (Reissue 1984), although the juvenile court ordered termination of parental rights between M.J. and the appellant.

We affirm the action of the juvenile court in terminating appellant's parental rights as to T.J., L.W. (1978), and L.W. (1979). We reverse the order of the juvenile court terminating the appellant's parental rights to M.J. and remand for further proceedings for determination as to that issue.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF J.S., S.C., AND L.S., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. P.S. AND C.S., APPELLANTS, AND M.S., APPELLEE.

397 N.W.2d 621

Filed December 19, 1986. No. 85-937.

1. **Parental Rights: Appeal and Error.** An appeal from an order terminating parental rights is reviewed by this court de novo on the record.
2. **Parental Rights.** An order terminating parental rights must be supported by clear and convincing evidence and should be made only as a last resort when no reasonable alternative exists.
3. _____. The primary consideration in a parental rights termination case is the best interests of the child.
4. _____. A child should not be left suspended in foster care and should not be required to exist in a wholly inadequate home. Further, a child cannot be made to await uncertain parental maturity.
5. **Appeal and Error.** Assignments of error not briefed are not considered.

Appeal from the Separate Juvenile Court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

Michael J. Elsken, for appellant P.S.

Richard L. Kohn, for appellant C.S.

Michael G. Heavican, Lancaster County Attorney, and Jan W. Sharp, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

The father of J.S., S.C., and L.S. and the mother of S.C. and L.S. appeal from the order of the separate juvenile court of Lancaster County terminating their parental rights. The mother of J.S. did not appeal the order terminating her parental rights, and, as her parental rights are not at issue, the use of the term parents in the following discussion refers solely to the father and the other mother involved unless otherwise indicated.

The children are the offspring from two different marriages. The natural father, P.S., was initially married to M.S., and two children, R.J.S. and J.S., were born of the marriage. The marriage was dissolved on August 11, 1977, and P.S. was given custody of both children. P.S. subsequently remarried, and two more children, S.C. and L.S, were born. C.S. is the natural mother of S.C. and L.S.

A petition was filed on June 26, 1972, which alleged that R.J.S. was a neglected child. The trial court found both natural parents, P.S. and M.S., incapable of caring for R.J.S. and on June 30, 1972, placed the child in foster care. R.J.S. has remained in foster care since that time, and his disposition is not an issue in this appeal.

On June 15, 1977, a second petition was filed, alleging that J.S. lacked proper care due to the neglect of her natural parents, P.S. and M.S. Temporary legal custody was given to the Lancaster County Department of Public Welfare, and she was placed in foster care. On February 21, 1979, J.S. was returned to P.S. and his second wife, C.S., on a trial basis.

A supplemental petition was filed on August 12, 1981, alleging that J.S., S.C., and L.S. were neglected children through the faults of P.S. and C.S. Custody of all three children was given to the Lancaster County Department of Public Welfare, and the children were placed in foster care. When this disposition was reviewed on November 9, 1981, the trial court continued foster care because the parents had not corrected the problems leading to the removal of the children.

On March 9, 1982, the disposition was again reviewed, and a trial placement of the children with their parents was ordered. Additional review hearings were held every 6 months. On November 30, 1983, the trial court found the parents were unable to care for the children. The children were placed in foster care and have remained in foster care since that time.

When the disposition was reviewed on December 18, 1984, the trial court found the parents were still unable to assume the care of their children, and foster care was continued. The parents were ordered to demonstrate that they could provide for themselves and control their mental health problems so that they could provide for the children. Further, the court ordered the parents to demonstrate they could provide a home for themselves and their children and to budget their income so as to pay for transportation to visit the children.

The matter was again reviewed in June 1985. The State recommended that visitation by the parents be terminated, but the trial court found the evidence was insufficient to show that the visitation was injurious to the children. Custody of the children was continued in the Department of Social Services, and the court again set out a plan for the parents to follow in order to regain custody of their children. The plan required P.S. to continue, and C.S. to begin and complete, mental health counseling, for both parents to cooperate with and participate in services directed by their caseworker, for the parents to maintain an appropriate living situation and demonstrate their ability to provide a stable home for their children, and for the parents to sufficiently control their mental health problems so that they could care for the children.

The third supplemental petition, filed September 3, 1985, sought termination of all parental rights to the three children.

The petition alleged that P.S. and C.S. had failed to demonstrate their ability to budget money and provide for the necessities of life for themselves and the children; that both parents suffered from mental disorders which prevented them from being able to parent their children; that neither parent had followed through with mental health treatment directed by the therapists; and that because of the neglect of the parents the children had remained in foster care. The petition further alleged that the parents had substantially and continuously or repeatedly neglected their children and refused to give them necessary care. The petition sought a determination that the children were within the purview of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984) and that reasonable efforts to correct the problems, under the direction of the court, had failed. The petition further alleged that termination was in the best interests of the children; that the parents were unable to parent due to mental illness or mental deficiency; and that there were reasonable grounds to believe the conditions preventing them from parenting would continue for a prolonged and indeterminate period.

The matter came on for trial on October 8, 9, 25, and 28, 1985.

The trial court found that the State had proven by clear and convincing evidence that parental rights should be terminated. Specifically, the court found that the parents had not provided the necessities of life for their children; that both parents suffered from mental disorders which prevented them from being able to parent; that neither parent had followed through with mental health treatment directed by the therapists; and that both parents had substantially, continuously, and repeatedly neglected the children and refused to give them necessary parental care and protection. The court found the children were children as described in § 43-247(3)(a); that reasonable efforts to correct the problem under court supervision had failed; and that the parents were unable to parent due to mental illness or deficiency and would remain in such a condition for a prolonged and indeterminate period. This appeal followed.

Both appellants assign as error the trial court's finding that

the evidence presented was sufficient, clear, and convincing to support a finding of termination. Appellant C.S. also assigns as error the trial court's overruling of her objection to the testimony of Dr. William McNeil as to whether her mental illness affected the children and presented harm to them, and whether C.S. would be able to parent in the future.

An appeal from an order terminating parental rights is reviewed by this court de novo on the record. *In re Interest of A.L.N.*, 223 Neb. 675, 392 N.W.2d 780 (1986); *In re Interest of V.B. and Z.B.*, 220 Neb. 369, 370 N.W.2d 119 (1985). The order must be supported by clear and convincing evidence and issued only as a last resort when no reasonable alternative exists. *In re Interest of A.L.N., supra.* See, also, *In re Interest of P.F.*, 222 Neb. 44, 381 N.W.2d 921 (1986). The primary consideration in such a case is the best interests of the child. *In re Interest of A.L.N., supra.* As we stated in *In re Interest of D.*, 218 Neb. 23, 29, 352 N.W.2d 566, 570 (1984), "A child cannot be left suspended in foster care, and should not be required to exist in a wholly inadequate home. Further, a child cannot be made to await uncertain parental maturity."

From our review of the record we find that the State presented clear and convincing evidence that the parents are unable to care for the children, that they will remain unable to do so for an indeterminate period of time, and that termination is in the best interests of the children. Although the parents have made some attempts to correct the problems which led to the placement of the children in foster care, the record shows a pattern of parental conduct that demonstrates that the parents will never be able to adequately care for their children.

P.S. has been involved with the State of Nebraska with regard to the parenting of his children since 1972. C.S. has been involved with the State since 1979. J.S. was first placed in foster care in July 1977, where she remained until February 1979, a period of almost 2 years. She was then returned to her parents and remained with them until August 1981. At that time she was again placed in foster care, where she remained until March 1982, a period of 7 months. She returned to her parents and remained there for 18 months, until September 1983, when she was again placed in foster care. She has remained in foster care

since 1983, a period of 3 years. Thus, J.S. has been in foster care over one-half of the time since 1977. S.C. and L.S. were first placed in foster care in August 1981. They were returned to their parents on a trial basis in March 1982, where they remained until September 1983, when they were again placed in foster care and have there remained. Thus, these two children have been in foster care more than one-half of the time since 1981.

Extensive testimony was presented at the hearing concerning the parents' ability to parent the children and whether the parents had followed the court-ordered plan of rehabilitation. There was some evidence that P.S. had sexually molested J.S. when she was a small child. Since 1977, the family has had a succession of caseworkers who have attempted to work with the family on housekeeping, maintaining contact with mental health professionals, and meeting the needs of their children.

A caseworker, Mary Osborne, testified that on her first visit with the family in September 1982, the house was adequately clean, but the parents stated they had missed an appointment with their mental health counselor because they overslept. Later that month, at a subsequent home visit, the house was not as clean as before but still adequate. During the home visits in October 1982, the condition of the house continued to deteriorate. The parents, however, did not feel the condition of the house was a problem. By November 1982 the house was very dirty, P.S. had moved out and C.S. was subsequently admitted to the Lincoln Regional Center, and the children had been placed in foster care.

The children were returned to their parents on April 7, 1983. For the next 7 months Osborne or another caseworker visited the family twice a month and testified that the condition of the house deteriorated rapidly. Osborne testified that in June 1983 there were "lots of cockroaches and insects in the home crawling the walls." Again, the parents did not recognize the condition of the home as a problem. In July 1983 the house was extremely dirty, the cockroach problem had worsened, and there was a very strong odor of urine in the house.

By August 1983 the situation had grown worse, the floors were extremely dirty, there were dog feces throughout the

house, the sheets on the boys' beds were "almost black," and there was a strong odor throughout the house. Further, the screens leading to the second-story roof had been pushed out, and toys were observed on the roof of the house. P.S. stated the children had been playing there. P.S. stated he did not realize the cleanliness of the house was "that bad." The bathroom was also very dirty. It was the caseworker's opinion that the house presented a health hazard at that time. The house remained in the same condition throughout August 1983. The caseworker informed C.S. that foster care placement was again indicated. Shortly thereafter, C.S. was committed to the Lincoln Regional Center and the children removed by the police.

On cross-examination Osborne testified that it was her opinion the parents have a pattern of behavior which led her to conclude that their parental rights should be terminated. The pattern, as she described it, is that when C.S. is initially released from intensive mental health treatment, the parents are able to establish an adequate home; but when the children are returned, the parents cannot sustain their mental health treatments or keep the house in an adequate condition.

Murial Lau, a foster parent for the children from December 1982 until April 1983, and from September 1983 until August 21, 1985, testified that P.S.'s personal hygiene was so poor that she requested his visits in her home be terminated. She testified that C.S. also did not have good personal hygiene. Lau testified that she observed behavioral problems in the children following visits with their parents, including destroying gifts given them by the parents, rebelliousness, fighting among the children, and soiling or wetting their pants. The behavioral problems began after the children returned to the Laus' residence in September 1983. The children also exhibited problems at school.

Dr. William McNeil, a psychologist employed by the Child Guidance Center, was a member of a team which evaluated all three children in May 1984. The children were tested individually, and the team then reviewed the data. The team was provided background information from Child Protective Services concerning the parents. The team concluded the children "had and were responding negatively to the parents' lifestyle." The children exhibited a great deal of anxiety related

to their physical safety and the meeting of their basic needs at home.

Although the children had formed a strong attachment to their parents, the nature of the attachment was one of insecurity and was viewed by the team as a negative rather than positive factor in the children's lives. The team concluded that it was important for the children to have permanency and stability in their lives and that the parents could not provide it. The team recommended that the parental rights be terminated and the children put in an adoptive situation.

The team also concluded that parental visitation was adverse to the children's interests. In light of their data compilation, the team concluded that it would be damaging to return custody of the children to their parents because the parents' past behavior evidenced their inability "to control themselves and to regulate their own lives, much less the lives of their children. They could not help the children organize the environment in a very clear, coherent way."

Dr. McNeil reviewed the documentation provided to him by various agencies regarding the parents and, based on that data, formulated an opinion concerning the parents' ability to care for the children. It was his opinion that while the parents had at times demonstrated positive parenting skills and maintained an adequate house,

> by and large these changes were not integrated into their lifestyle on a very consistent basis, that by and large the environment was often chaotic and that it did not look as if they had responded very well to the intervention of other people in the community over a fairly long period of time.

In his opinion the positive changes "have to become integrated and made part of the individual and part of a way of life." He did not find enough evidence in his review of the parents' records to indicate the positive changes were stable. Dr. McNeil also concluded that the family is "pretty resistant to change." Dr. McNeil's findings were later verified by Dr. Howard Halpern, who concurred in his conclusions.

Terri DeBuhr, a case aide for the Department of Social Services, testified that each time the parents moved, the house started out in good condition and became progressively worse.

Marilyn Schwebke, another case aide, testified that she had been involved with the family from early 1983 through August 1984. In her opinion, based on her experience with the family, neither parent was able to perceive and meet the emotional needs of the younger children.

C.S.'s uncle testified that he had observed filthy conditions in the appellants' homes beginning in 1978. He testified that the hygiene of the children and the parents was always poor when he visited them. In his opinion the parents were unable to care for themselves, much less their children.

Dr. William Stone testified that C.S. had told him she had been in the Lincoln Regional Center every year since 1980. He testified that she missed five of eight scheduled appointments with him. C.S. had indicated to him that she had no need to work on any mental problems, aside from getting other people to realize that she did not have any. Based on the results of tests administered to C.S., Dr. Stone concluded that C.S. had some "fairly serious emotional problems," had difficulty perceiving reality, and had hostility to authority figures.

Both parents missed so many appointments that Dr. Stone warned them that continued failure to appear would result in his refusal to see them. The parents missed the very next appointment, but Dr. Stone agreed to set up one more appointment to go over their test results, and the parents again failed to appear. Dr. Stone testified that his diagnosis of C.S. was that she suffers from chronic schizophrenic disorder. He concluded that in her case the condition would be present for a prolonged, indeterminate period. In his opinion C.S. would require supportive therapy over an indefinite period of time. Dr. Stone also testified that because of her mental condition C.S. would sometimes pose a danger to the children because her contact with reality would not allow her to care for them.

Dr. Stone further testified that P.S. had indicated he could not tolerate the children for extended periods of time and that he had been sexually involved with J.S. at one point. His diagnosis of P.S. was that P.S. was overtly psychotic, that his thinking was very confused and hostile, and that he was unable to perceive reality. It was Dr. Stone's opinion that P.S.'s condition would continue indefinitely. He also testified that, in

his view, it was unlikely the parents could provide care for and meet the needs of their children.

Linda Freeman, an assigned homeworker, testified that the parents missed half of their scheduled appointments with her and were uncooperative and unresponsive during the 2½ months she attempted to work with them in late 1982. Another caseworker, Charlie Bennett, testified that, in his experience with the parents, he observed a pattern of behavior with regard to the cleanliness of their homes: when the parents first moved into a new place, the housekeeping was adequate but then deteriorated.

Dr. Daniel J. Weber, the psychiatrist most recently involved with the parents, testified the two had missed quite a number of appointments. His prognosis was that P.S. may be better able to work on his emotional problems than C.S. because C.S. lacks motivation to do so. He also stated that his prognosis of C.S.'s being able to cope with her mental problems sufficiently to be able to parent was poor.

Lawrence Reznicek, a clinical social worker who has worked with the parents intermittently since 1981, testified that he had observed a pattern of deterioration in the parents' ability to cope with life.

Lorie Fink, the family's caseworker, testified as to the parents' poor personal hygiene, problematic parenting skills, and mental health problems. As recently as September 1985, only 1 month before the termination hearing, the mother still was not consistently participating in mental health counseling. Fink testified that she had informed the parents in April 1985 that a request for termination had been made, and the reasons why it had been recommended: the mental health problems, living skills, housekeeping, and inappropriate use of medications. Fink testified that she visited the parents at their apartment the morning before she testified at the hearing, on a scheduled visit, and found the home dirty and cluttered, flies in the refrigerator, and a strange odor throughout the apartment. The only food in the house was a box of powdered milk. Both parents told her they had not been seeing their mental health counselors.

C.S. testified that in her opinion there was no housekeeping

problem when Fink last visited; that she really did not have a mental health problem; and that she did not clean up after the dogs because that was not her job.

P.S. testified that in his opinion there had been no housekeeping problem on Fink's last visit and that the parents would be able to parent their children.

The evidence is clear and convincing that the parental rights of P.S. and C.S. to the three children should be terminated. There is extensive evidence concerning the parents' mental health problems, the effects of those problems, and the parents' consistent failure to obtain treatment over the past several years.

Further, there was an abundance of evidence of the parents' failure to comply with the various rehabilitation plans ordered by the court. It is clear that the parents are unable to care for their children and will be unable to do so in the foreseeable future. The children have spent the majority of their lives in foster care but are now in a potentially adoptive home which offers them permanence and stability. Like the child in *In re Interest of D.*, 218 Neb. 23, 352 N.W.2d 566 (1984), these children should not be left suspended in foster care or returned to a wholly inadequate home.

The assignment of error concerning C.S.'s objection to Dr. McNeil's testimony regarding the impact of her mental health problems on her ability to parent was not briefed. Accordingly, it will not be considered. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). See, also, *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986).

The judgment of the juvenile court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL P. KANE, APPELLANT.

397 N.W.2d 628

Filed December 19, 1986. No. 86-268.

1. **Convictions: Directed Verdict.** Only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, will a trial court be justified in directing a verdict of not guilty.
2. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish defendant's guilt beyond a reasonable doubt.
3. **Sentences: Probation and Parole.** The granting of probation as opposed to imposing a jail sentence is a matter left for the discretion of the trial court.
4. **Sentences: Appeal and Error.** Absent an abuse of discretion, this court will not disturb a sentence imposed within the statutory limits.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays, for appellant.

Robert M. Spire, Attorney General, and James H. Spears, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

The defendant, Michael P. Kane, appeals his conviction of one count of arson in the first degree in violation of Neb. Rev. Stat. § 28-502(1) (Reissue 1985). The defendant alleges the district court erred in denying the defendant's motions for directed verdict at the close of the State's case and at the conclusion of all the evidence. The defendant further alleges the district court abused its discretion in refusing to place the defendant on probation and imposing a sentence that was excessive and disproportionate to the severity of the offense, when considered with the defendant's background and prior record. For the reasons hereinafter stated we affirm.

The record shows the following. In an information filed on September 24, 1985, the defendant, Michael P. Kane, was

charged with one count of arson in the first degree. The defendant had been living in an apartment rented from Daniel Schroeder for approximately 1 year prior to September 5, 1985. During the early morning hours of September 5, 1985, a fire occurred in the apartment occupied by defendant. Ronald D. Peery, a fire investigator for the city of Lincoln, was called to investigate the fire at about 3 a.m. on September 5. Upon completion of his investigation Peery determined that the fire had two points of origin. Based upon this finding, Peery concluded the fire had been intentionally set. Defendant was arrested and charged with the crime.

The case was tried before a jury. The evidence presented to the jury was largely circumstantial. Prior to September 5, 1985, the defendant had several conflicts with the owner of the apartment building. These conflicts included defendant's failure to pay rent, flooding of the apartment below due to the overflow of the defendant's sink and bathtub, the removal of several light bulbs from the apartment, and the removal of all of the apartment numbers in the building. In August of 1985 the landlord asked the defendant to vacate the apartment. A formal eviction notice was sent to the defendant on August 12, 1985. The electrical service to the apartment had also been cut off.

Gloria Pulhamus, a witness for the State, testified that during the early morning hours of September 5, 1985, she and a companion were approached by defendant, who asked them to drive him to his apartment because defendant had been stopped for driving without a driver's license. Since Pulhamus and her friend needed a place to stay, they agreed to drive defendant to his apartment. Defendant indicated the two of them could sleep there. Pulhamus testified the apartment was a "mess." The electrical service had been discontinued. Defendant gave Pulhamus and her companion a large candle to provide light for them. Pulhamus testified that in response to her question concerning leaning the candle against the wall, defendant responded, "Well, it belongs to the landlord. Might as well just burn it down with the rest of it." In response to Pulhamus' questions regarding smoking in the apartment, the defendant told her to put the cigarettes out on the floor. Pulhamus

testified the defendant told her that, since he was evicted, it was about time that he burned something that belonged to the landlord. Pulhamus further testified that on the morning of the fire she was awakened by an unidentified individual who told her that the apartment was on fire. Pulhamus said she saw the defendant standing in the kitchen of the apartment with a smile on his face, walking around in the smoke as the apartment was burning. The defendant testified he had just returned from walking his dog when he noticed the apartment was on fire. The defendant stated he was in the kitchen looking for a fire extinguisher.

In addition to the testimony of Pulhamus, the evidence included a photograph of the wall in defendant's apartment. On the wall the phrase "Burn Baby Burn" was painted, with a line pointing toward the origin of the fire. The defendant testified this phrase was put on the wall a month prior to the fire and stated that it was just a political statement and was not meant to show that he intended to start the apartment on fire.

The defendant's first two assignments of error concern the failure of the district court to sustain defendant's motions for a directed verdict. It is the law in the State of Nebraska that only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, will a trial court be justified in directing a verdict of not guilty. *State v. Bridger*, 223 Neb. 250, 388 N.W.2d 831 (1986). The evidence in the case at bar was largely circumstantial. However, circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt. *State v. Ellis*, 223 Neb. 779, 393 N.W.2d 719 (1986); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981). It is not the responsibility of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. That is for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Ellis, supra*. See, also, *State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985); *State v. Rolling*, 209

Neb. 243, 307 N.W.2d 123 (1981). We determine that the evidence in the case at bar, although largely circumstantial, is sufficient when taken as a whole to prove defendant's guilt beyond a reasonable doubt. The trial court did not err in refusing to sustain the defendant's motions for directed verdict.

The defendant further assigns as error that the sentence imposed was excessive and disproportionate "to the severity of the offense when considered with the Appellant's background and prior record" and that the district court erred in refusing to place the defendant on probation. Regarding the refusal to place the defendant on probation, we find no error. The granting of probation as opposed to imposing a jail sentence is a matter which is left for the discretion of the trial court. Absent the showing of abuse of discretion, this court will not disturb the trial court's denial of probation. *State v. Bovill*, 223 Neb. 764, 393 N.W.2d 715 (1986); *State v. Gillette*, 218 Neb. 672, 357 N.W.2d 472 (1984); *State v. Last*, 212 Neb. 596, 324 N.W.2d 402 (1982).

As to defendant's contention that his sentence was excessive, this court has consistently held that absent an abuse of discretion, this court will not disturb a sentence imposed within the statutory limits. Arson in the first degree is a Class II felony. § 28-502(3). As such, it is punishable by a maximum of 50 years' imprisonment and a minimum of 1 year's imprisonment. Neb. Rev. Stat. § 28-105(1) (Reissue 1985). The defendant was sentenced to imprisonment for an indeterminate period of 5 to 10 years. The presentence report, setting out defendant's prior record, shows that defendant, a 44-year-old man, was convicted of burglary in 1962, shooting with intent to kill, wound, or maim and carrying a concealed weapon in 1977, and was imprisoned for each of these felony convictions. In addition, defendant has numerous misdemeanor convictions, including a $100 fine imposed in connection with a charge of destruction of property on August 27, 1985, at the same location where the arson in this case was committed. Defendant's sentence in this case was well within the prescribed statutory limits and obviously not excessive. The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF L.D., Z.D., N.D., AND D.D., CHILDREN UNDER 18 YEARS OF AGE.
ROBERT E. WHEELER, GUARDIAN AD LITEM, APPELLANT, STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. D.D., APPELLEE AND CROSS-APPELLANT, AND S.D., APPELLEE.

398 N.W.2d 91

Filed December 19, 1986. No. 86-310.

1. **Jurisdiction.** Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent.
2. **Jurisdiction: Appeal and Error.** Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter.
3. _____: _____. Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte.
4. **Minors: Statutes: Juvenile Courts.** The Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984), must be liberally construed to accomplish its purposes serving the best interests of juveniles within the act.
5. **Pleadings: Words and Phrases.** A petition, as a pleading, is a plaintiff's or claimant's written statement of fact which invokes the jurisdiction of a court, sets out a cause of action, and seeks relief.
6. **Pleadings: Affidavits: Jurisdiction.** Verification of a pleading constitutes no part of a pleading and, ordinarily, is not necessary to vest jurisdiction in a court.
7. **Pleadings: Affidavits: Waiver.** As any other formal matter, an absence of, or defect in, verification is waived by failure to make a proper and timely objection.
8. **Minors: Appeal and Error.** An adjudication under Neb. Rev. Stat. § 43-247 (Reissue 1984) of the Nebraska Juvenile Code is an appealable order.
9. **Jurisdiction: Judgments: Appeal and Error.** If a lower court does not have subject matter jurisdiction and, therefore, has no power to entertain the proceedings or decide a question, an appellate court lacks jurisdiction to review or evaluate an evidentiary determination for an act outside the jurisdiction of the court whose judgment or order is appealed.
10. _____: _____: _____. Although an extrajurisdictional act of a lower court cannot vest the appellate court with jurisdiction to review or evaluate an evidentiary determination involved in such act, an appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or final order sought to be reviewed.

Appeal from the District Court for Garfield County: RONALD D. OLBERDING, Judge. Reversed and remanded with direction.

Robert E. Wheeler, guardian ad litem, for appellant.

Curtis A. Sikyta, for appellee D.D.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

As authorized by the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984), on August 7, 1984, the county attorney of Garfield County, in his signed but unverified petition in the county court as a juvenile court, alleged that certain juveniles, that is, L.D. (7 years), Z.D. (6 years), N.D. (4 years), and D.J.D. (19 months), were "subject to the jurisdiction of this Court under Section 43-247 (3)(a) and are currently in a situation injurious to the health and/or morals" of the named juveniles.

Section 43-247 states in part:

> The juvenile court in each county as herein provided shall have jurisdiction of:
>
> (1) Any juvenile who has committed an act other than a traffic offense which would constitute a misdemeanor or an infraction under the laws of this state, or violation of a city or village ordinance;
>
> (2) Any juvenile who has committed an act which would constitute a felony under the laws of this state;
>
> (3) Any juvenile (a) who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; who is abandoned by his or her parent, guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile or (b)

who, by reason of being wayward or habitually disobedient, is uncontrolled by his or her parent, guardian, or custodian; who deports himself or herself so as to injure or endanger seriously the morals or health of himself, herself, or others; or who is habitually truant from home or school;

(4) Any juvenile who has committed an act which would constitute a traffic offense as defined in section 43-245.

Because we must determine the exact nature of certain actions taken by the juvenile court in this case, we examine and analyze the circumstances under which the juvenile court acted.

After the petition had been filed, on August 7 the children's parents, the father's attorney, and the county attorney attended a hearing in the juvenile court, where the father "submitted to the jurisdiction of the Court, admitting the need for Court intervention, but specifically not admitting any specific allegations or facts underlying the Petition." The court then appointed a guardian ad litem for all the children and an attorney for the father, but deferred appointment of counsel for the mother. The father filed a motion on August 31, requesting, among other items, visitation rights with his children. On September 25 the county attorney, the guardian ad litem, and the court-appointed counsel for the father appeared before the juvenile court, which ordered that psychological evaluations of all parties be completed within 45 days and the father's visitation of the children be supervised by the Department of Social Services. Although the father had never filed any pleading responsive to the petition, the father's attorney sought depositions from prospective witnesses.

Immediately before adduction of evidence at a hearing on April 30, 1985, the father's counsel expressed concern about safeguarding the father's privilege against self-incrimination and the possibility of criminal charges against the father for his acts involving the children. Regarding the hearing about to take place, counsel for the father stated: "[W]e need to back up and give [the father] a right to protect himself from the very beginning rather than going into disposition—going into these things on disposition." To expedite the pending proceedings in the juvenile court, the State expressed a willingness to extend

immunity to the father. The guardian ad litem remarked: "The whole issue is one of sexual abuse. If [the father] will not admit to the sexual abuse then I think the Court must make a determination of whether there was, otherwise we get rid of the case." Counsel for the mother commented that the hearing became necessary, since the father had denied any misconduct, and, therefore, the father's sexual abuse of his children had to be "proved to the satisfaction of the Court." In the presence of the parents, their lawyers, and the guardian ad litem, evidence was then adduced at the April 30 hearing before the juvenile court.

Nadine Folken, an employee of the Department of Social Services for the State of Nebraska, testified that she, in response to a report that the father had sexually abused his children, visited with the children, who described their sexual contacts with their father. One male child told Ms. Folken that his father had fondled the boy's genitals and, further, as the boy pointed to his genital area, informed Ms. Folken that "sometimes daddy hurts me." Another male child recounted to Ms. Folken an incident of sexual contact with his father and his father's semen. (We decline any further detailed elaboration of this particular incident.)

Dr. Thomas England, a clinical psychologist, testified concerning his interviews of the children in the fall of 1984. Two of the male children discussed incidents involving their father's fondling their genitals and his ejaculation in response to their "touching" him. Dr. England testified concerning the characteristics of a male individual involved in "incest or sexual molestation" and that he found such characteristics present in the father of the children. Dr. England concluded that there had been "sexual contact between [the father] and the children." Finally, Dr. England recommended that any visitation of the children by the father be supervised and that there should be counseling for "all parties."

One of the State's witnesses, a female first cousin of the children's father, testified that approximately 6 years before the hearing, when that witness was 13 years of age, the father of the children had "sexual intercourse" with the witness.

Called as a witness by the State, the children's father, age 34,

denied all sexual "incidents" with his children. The children's parents were divorced at the time of the hearing. The father did acknowledge that, when he was 12 years old, he had "closeness and simulation of sex but no penetration" of his 8-year-old sister. The father persisted in such relationship with his sister for a period in excess of 12 months. Also, the father admitted a "flashing" incident which had been publicly observed in the parking lot of a Grand Island mall in the fall of 1982, where the father performed a sexual act on himself "to relieve [his] tension." Later, after confrontation by the Grand Island police, who stated that "prosecution would be imminent if [he] did not take and get counseling and psychiatric evaluation," the father obtained psychiatric help.

Another psychologist, Dr. John Curran, testified for the State. Dr. Curran had interviewed L.D., Z.D., N.D., and their mother. As testified by Dr. Curran, the father had "little control over sexual impulses," one of the characteristics of "an abusing parent." Referring to the children's father and his relationship with his sister, Dr. Curran characterized that relationship "as a sexual abuse relationship; a predatory relationship." Dr. Curran pointed out two aspects of sexual abuse which indicate a chronic condition in an abuser: first, sexual abuse is highly rewarding to the abuser; and, second, sexual abuse usually is immediately rewarding to the abuser. In reference to the father in this case, and evaluating him in terms of those two aspects of the chronic sexual abuser, Dr. Curran concluded: "I would believe that [the father] is at risk for committing sexual abuse in the future, and I think that his children would likely be targets." Dr. Curran also testified that sexually abused children "start postulating that they were somehow responsible for these acts. Some of that leads to them thinking they are dirty, not worthwhile, and that the—this leads into further problems." As noted by Dr. Curran, immediate damage from sexual abuse to children includes distrust of adults, bed-wetting, and an excessive fear of being alone in the bathroom. Dr. Curran further testified regarding "long term damage characteristics" of sexually abused children, namely, a difficulty in formation of sound relationships with others, inappropriate sexual behavior, running away from home, and chronic depression.

Finally, Dr. Curran concluded that there had been "sexual abuse perpetrated upon [L.D.] by his father."

The children's mother testified that the children were elated when they learned that "daddy wouldn't be gettin' in bed" with them any more.

During the hearing on April 30, counsel for the father made several objections, including objections regarding hearsay, irrelevant evidence, testimony lacking foundation, leading questions, argumentative questions, and competency of witnesses; requested that certain evidence be stricken; stipulated to the qualifications of Drs. England and Curran as expert witnesses; called the court's attention to repetitious questions; and requested a ruling by the court when it appeared that the court had deferred ruling on or overlooked objections made by the father's counsel.

At conclusion of the evidence adduced at the April 30 hearing, the court remarked: "[B]efore we can order any counseling we've got to order—we've got to find sexual abuse otherwise we've got to just dismiss it [the petition and proceedings]." The court took the matter under advisement and, on May 6, "after carefully considering the evidence," found "there has been some evidence of sex abuse" and ordered that the father be permitted to visit his children, subject to supervision from the Department of Social Services. The court further ordered that the father "shall receive counselling for sex abuse, and that such supervision and counselling shall gradually diminish as the situation improves [and] that this matter shall be reviewed at the end of 3 months."

On May 9 the father filed a motion requesting clarification of the kind of counseling ordered by the court and specification of the "type of visitation" he might exercise regarding his children. In August the father filed another motion, informing the court about the unavailability of a psychologist for counseling and requesting a review as soon as possible.

There was never another hearing until October 18, when the court, on its own "Motion for Review Hearing" and without reception of additional evidence, found that "at the April 30, 1985 Dispositional Hearing, there was insufficient evidence to show sexual abuse and the matter is therefore dismissed."

The guardian ad litem, in his appeal to the district court, presented two contentions. First, the guardian ad litem alleged that, as a result of the adjudication hearing on April 30 and as reflected in the order of May 6, the juvenile court found that the father had sexually abused his children. Second, the guardian ad litem contended that, in view of the order of May 6, which was based on the evidence adduced at the April 30 hearing, the juvenile court improperly ordered the case dismissed on October 18.

In reaching its decision, the district court found two statutes were controlling, namely:

> The county attorney or any reputable person residing in the county, with the consent of the county attorney, having knowledge of a juvenile in his or her county who appears to be a juvenile described in subdivision (1), (2), (3), or (4) of section 43-247 may file with the clerk of the court having jurisdiction in the matter, a petition in writing specifying which subdivision of section 43-247 is alleged and setting forth the facts verified by affidavit. Allegations under subdivisions (1), (2), and (4) of section 43-247 shall be made with the same specificity as a criminal complaint. It shall be sufficient if the affidavit is based upon information and belief. . . .

§ 43-274; and:

> Except when the care of the juvenile is awarded to the Department of Social Services, together with termination of parental rights, or the juvenile has been legally adopted, the jurisdiction of the court shall continue over any juvenile brought before the court, or committed under the provisions of sections 43-245 to 43-2,129, and the court shall have power to order a change in the custody or care of any such juvenile, if at any time it is made to appear to the court that it would be for the best interests of the juvenile to make such change.

§ 43-295.

According to the district court, the county attorney's unverified petition prevented the juvenile court's acquisition of jurisdiction, and § 43-295 authorized the juvenile court to change its May 6 order. For those reasons the district court

affirmed the October 18 order of the juvenile court, that is, dismissal of the proceedings, entered an order on costs, and awarded a fee of $200 to the guardian ad litem and to the court-appointed counsel for the father.

On appeal to this court the guardian ad litem contends (1) notwithstanding the unverified petition in the proceedings, the juvenile court adjudicated that the children were juveniles within the Nebraska Juvenile Code as the result of their father's sexual abuse of the children, and (2) the October 18 order of the juvenile court, vacating the order of May 6, is not authorized by law. The father has cross-appealed, claiming the district court erred in the amount allowed as an attorney fee for the services of the father's court-appointed counsel in the appeal to the district court.

We now cut the gordian knot binding the case before us.

First, we examine the district court's decision that, as the result of the unverified petition, the juvenile court never acquired jurisdiction. If the district court is correct in its decision that the juvenile court lacked jurisdiction for the hearing of April 30 and the order of May 6, the district court's further finding that the juvenile court was authorized to vacate its previous order is gratuitous.

"Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent." *Coffelt v. City of Omaha*, 223 Neb. 108, 110, 388 N.W.2d 467, 469 (1986). See, also, *Riedy v. Riedy*, 222 Neb. 310, 383 N.W.2d 742 (1986). "Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter." *Glup v. City of Omaha*, 222 Neb. 355, 359, 383 N.W.2d 773, 777 (1986). "Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte." *Id.* Regarding the unverified petition in the juvenile court, the district court apparently applied the preceding principles regarding jurisdiction, as enunciated in *Coffelt, Riedy*, and *Glup*, inasmuch as the father has never

objected to the form of the petition, that is, absence of verification.

As expressed in § 43-247: "The juvenile court in each county as herein provided shall have jurisdiction of" any juvenile involved in the specific situations described in that statute. The Nebraska Juvenile Code further provides: "[The Nebraska Juvenile Code] shall be liberally construed to the end that its purpose may be carried out as provided in section 43-246." § 43-2,128. Hence, the Nebraska Juvenile Code must be liberally construed to accomplish its purposes serving the best interests of juveniles within the act. See, *Healey v. Johnson*, 188 Neb. 677, 198 N.W.2d 466 (1972); *State v. Randall*, 187 Neb. 64, 187 N.W.2d 586 (1971).

As a part of the Nebraska Juvenile Code, § 43-246 provides:

> Acknowledging the responsibility of the juvenile court to act to preserve the public peace and security, [the Nebraska Juvenile Code] shall be construed to effectuate the following:
>
> (1) To assure the rights of all juveniles to care and protection and a stable living environment and to development of their capacities for a healthy personality, physical well-being, and useful citizenship and to protect the public interest . . . .

Although an adjudication under subsections (1), (2), (3)(b), and (4) of § 43-247 must be based on "proof beyond a reasonable doubt," an adjudication under subsection (3)(a) of § 43-247 is based on "a preponderance of the evidence." § 43-279(2).

We note that § 43-279 (Cum. Supp. 1986), which became effective on September 6, 1985, now requires all adjudications under § 43-247 except an adjudication involving subsection (3)(a) to be "based upon proof beyond a reasonable doubt." We further note that § 43-279.01 (Cum. Supp. 1986), which governs an adjudication under subsection (3)(a) of § 43-247 and also became effective on September 6, 1985, no longer indicates applicable rules of evidence but does retain the requirement that proof be "by a preponderance of the evidence."

Thus, the quantitative proof required for an adjudication

based on subsection (3)(a) of § 43-247, as alleged in the present case, is a "preponderance of the evidence" and, therefore, is analogous to the standard of proof generally applicable in civil cases. In contrast, an adjudication under subsections (1), (2), (3)(b), and (4) of § 43-247 is based on "proof beyond a reasonable doubt" and in that regard is akin to cases brought under the Nebraska Criminal Code or other statutes specifying a criminal offense. An explanation for those different evidential requirements may be the particular conduct examined by a juvenile court, that is, subsections (1), (2), (3)(b), and (4) of § 43-247 relate to a juvenile's misconduct, whereas subsection (3)(a) of § 43-247 pertains to another's conduct inflicted upon or directed toward a juvenile. Also, conduct as a basis for terminating parental rights, see § 43-292, must be established by "clear and convincing evidence." *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 107, 368 N.W.2d 474, 479 (1985). However, in the case before us the State did not seek termination of parental rights, and the quantum of proof, as will develop in our opinion, is not an issue. Nevertheless, we find that an adjudication based on subsection (3)(a) of § 43-247 is analogous to a civil proceeding, which guides us in answering some of the questions presented in the case now under consideration.

Section 43-279(3) provides:

> If the court shall find that the juvenile named in the petition is not within the provisions of section 43-247 it shall dismiss the case. If the court finds that the juvenile named in the petition is such a juvenile, it shall make and enter its findings and adjudication accordingly, designating which subdivision or subdivisions of section 43-247 such juvenile is within; the court shall then proceed to an inquiry into the proper disposition to be made of such juvenile.

We arrive, then, at one of the questions raised in this appeal: Is verification of a petition necessary to vest jurisdiction in a juvenile court for an adjudication pursuant to § 43-247(3)(a)? A petition, as a pleading, is a plaintiff's or claimant's written statement of fact which invokes the jurisdiction of a court, sets out a cause of action, and seeks relief. See, *Paxton v. State*, 59

Neb. 460, 81 N.W. 383 (1899); *Brown v. Peters*, 127 Tex. 300, 94 S.W.2d 129 (1936); *Warren v. Roberts, Judge*, 144 W. Va. 741, 110 S.E.2d 909 (1959). Nebraska's civil procedure previously required verification of pleadings. See Neb. Rev. Stat. § 25-824 (1943): "Every pleading of fact must be verified by the affidavit of the party, his agent, or attorney." In 1969 the requirement of verified pleadings in civil cases was eliminated. See § 25-824 (Cum. Supp. 1969). Verification of a pleading, such as the petition in the case before us, constitutes no part of a pleading and, ordinarily, is not necessary to vest jurisdiction in a court. See, *Johnson v. Jones*, 2 Neb. 126 (1873); *Dorrington v. Meyer*, 8 Neb. 211 (1879); *Northup v. Bathrick*, 80 Neb. 36, 113 N.W. 808 (1907) (syllabus of the court) ("The verification of a pleading is not jurisdictional"); *In re Estate of Shaffer*, 203 Kan. 264, 454 P.2d 1 (1969); *Chandler v. Taylor*, 234 Iowa 287, 12 N.W.2d 590 (1944); *United Farm Workers v. Agr. Labor Relations*, 37 Cal. 3d 912, 694 P.2d 138, 210 Cal. Rptr. 453 (1985).

As expressed in *Preparatory Temple, etc. v. Seery*, 81 N.J. Super. 429, 433, 195 A.2d 900, 903 (1963): "[Verification] is a purely procedural direction which is formal but does not go to the essence of the law with regard to requirements for jurisdiction of the courts." Also, as any other formal matter, an absence of, or defect in, verification is waived by failure to make a proper and timely objection. See, *Woods v. Woods*, 177 Neb. 542, 542-43, 129 N.W.2d 519, 521 (1964) ("pleading over waived any objection as to verification"); *Emery v. Bennett*, 97 Kan. 490, 155 P. 1075 (1916); *Hite v. Reynolds*, 163 Ky. 502, 173 S.W. 1108 (1915); 61A Am. Jur. 2d *Pleading* § 349 (1981). In the case before us the father participated in proceedings and requested affirmative relief in an action commenced by the petition he now assails. If there were any deficiency of formalities in that petition, the father has waived his right to question any formal matters pertaining to that petition. Having considered some of the purposes of the Nebraska Juvenile Code and the construction to be given that act, we, therefore, hold that verification of a petition alleging a child to be a juvenile within § 43-247(3)(a) is not required to vest jurisdiction in a juvenile court. Nevertheless, it is the adjudication that a child is

a juvenile, as characterized in § 43-247, which vests subject matter jurisdiction in a juvenile court, not the petition by which an adjudication is requested in proceedings before a juvenile court.

Before addressing the propriety of the juvenile court's order entered on October 18, 1985, we must determine the nature of the hearing on April 30 and the order of May 6 in these proceedings. The father, on realizing he was about to enter a judicial evaluation of his conduct toward his children, asserted his right "to protect himself from the very beginning rather than going into disposition—going into these things on disposition." Such assertion by the father was obviously prompted by § 43-283, which provides: "Strict rules of evidence shall not be applied at any dispositional hearing." The manner in which evidence was presented to the juvenile court establishes that the hearing of April 30 was conducted under or governed by the "customary rules of evidence," see § 43-279(1), that is, adduction of evidence at the April 30 hearing was controlled by the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1985). Clearly, the father wanted evidence at the April 30 hearing to be controlled by the Nebraska Evidence Rules rather than await a dispositional hearing, where evidence admitted under less stringent rules might make his rebuttal to the petition extremely difficult, if not impossible. When we take into account the remarks, statements, and comments by the parties immediately before the hearing of April 30, and when we consider the juvenile court's expression about the hearing, namely, "we've got to find sexual abuse otherwise we've got to just dismiss" the case, we can reach but one conclusion: The hearing on April 30 was intended to be, and was, an adjudication based on the father's conduct toward his children, or, more precisely, a determination whether the father had sexually abused his children. According to the petition filed in this case, the only subdivision of § 43-247 pertinent to the proceedings was (3)(a), that is, the children were in a situation which was "injurious to the health or morals" of those children. On May 6, after the juvenile court had found evidence of the father's sexual abuse of his children, the court did not dismiss the petition, see

§ 43-279(3), and, therefore, did adjudicate, albeit implicitly, that the father's misconduct brought the children within the purview of § 43-247(3)(a) as juveniles who were in a situation "injurious to the health or morals" of those juveniles. Thus, the order entered by the juvenile court on May 6, 1985, based on the evidence presented at the hearing of April 30, was an adjudication that the children were juveniles within the Nebraska Juvenile Code and that, therefore, the court had subject matter jurisdiction. An adjudication under § 43-247 of the Nebraska Juvenile Code is an appealable order. See, *In re Interest of V.T. and L.T.*, 220 Neb. 256, 369 N.W.2d 94 (1985); *In re Interest of Aufenkamp*, 214 Neb. 297, 333 N.W.2d 681 (1983); *State ex rel. Casselman v. Macken*, 194 Neb. 806, 235 N.W.2d 867 (1975).

We now address the issue of the propriety of the juvenile court's order entered on October 18, 1985, setting aside the adjudication made on May 6.

Neb. Rev. Stat. § 24-541.02 (Reissue 1985), pertaining to appeals from proceedings in the county court sitting as a juvenile court, provides in part: "(1) In order to perfect an appeal from the county court the appealing party shall within thirty days after the rendition of the judgment or making of the final order complained of [statutory requirements omitted]."

If a lower court does not have subject matter jurisdiction and, therefore, has no power to entertain the proceedings or decide a question, an appellate court lacks jurisdiction to review or evaluate an evidentiary determination for an act outside the jurisdiction of the court whose judgment or order is appealed. See *Glup v. City of Omaha*, 222 Neb. 355, 383 N.W.2d 773 (1986). However, although an extrajurisdictional act of a lower court cannot vest the appellate court with jurisdiction to review or evaluate an evidentiary determination involved in such act, an appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or final order sought to be reviewed. See *Glup v. City of Omaha, supra.*

No one appealed the juvenile court's order entered on May 6. In the absence of an appeal pursuant to § 24-541.02, the adjudication of May 6 became, and is, a final order, due to the

expiration of 30 days from rendition of that judgment and entry of such order. It is true that § 43-295 does allow a juvenile court to alter its previous order concerning "custody or care" of a juvenile. Section 43-295 is a statutory analog to Neb. Rev. Stat. § 42-351(1) (Reissue 1984) authorizing a district court's continuing jurisdiction involving "the custody and support of minor children" affected by proceedings for dissolution of a marriage. Cf. *Nimmer v. Nimmer*, 203 Neb. 503, 505, 279 N.W.2d 156, 158 (1979): "The decree of a District Court in an action for the dissolution of a marriage, insofar as minor children are concerned, is never final in the sense it cannot be changed. [Citation omitted.] Thus the court has continuing jurisdiction." Cf., also, *Nemec v. Nemec*, 219 Neb. 891, 367 N.W.2d 705 (1985). However, in the case before us, after an apparent reevaluation of the evidence underlying its May 6 judgment and order, which had become final, the juvenile court, on October 18, vacated its previous order and judgment because "there was insufficient evidence to show sexual abuse." Section 43-295 does not empower a juvenile court to review the evidentiary basis of its order which has become final as an adjudication of subject matter jurisdiction made under § 43-247. Under the circumstances of this case, the juvenile court lacked subject matter jurisdiction for its order of October 18, 1985, vacating the May 6 adjudication that the children were juveniles within the meaning of the Nebraska Juvenile Code. As a consequence of the juvenile court's lack of jurisdiction for its October 18 order, the district court had no jurisdiction to review any evidentiary determination made by the juvenile court without jurisdiction and should have set aside the juvenile court's order of October 18, which had dismissed the petition and proceedings brought by the county attorney. The district court committed error in failing to set aside the juvenile court's order of October 18, 1985.

Further, because the juvenile court's act setting aside its previous adjudication and final order of May 6 was beyond or outside the power of that court, the district court was without jurisdiction to enter an order awarding any fee for proceedings before the district court. Awarding a fee on account of the district court proceedings would be approbation and

enforcement of the juvenile court's action taken without jurisdiction. As far as shown by the record presented to us, the juvenile court still has jurisdiction for further proceedings consistent with the Nebraska Juvenile Code, and the matter of fees and costs may be considered by the juvenile court. The district court lacked jurisdiction to enter its order on fees and costs and, therefore, committed error in making such order.

Before remanding this matter to the district court, we are compelled to make certain observations about the proceedings in the juvenile court. We remind the juvenile court and counsel that this case involves impressionable children in their formative years, not impersonal flotsam and jetsam adrift on a sea of indecision or, much worse, societal insensitivity or apathy. According to the court stenographer's certificates, the proceedings in the juvenile court consist of 80,750 words. There is one additional word which characterizes what has happened to the children in this case. However, judicial restraint precludes use of that word. As noted by the district court, the fees and costs thus far incurred in the juvenile court exceed $19,000, but that sum does not begin to approach the price being paid by the children, languishing during labyrinthine litigation in the juvenile court while they await a dispositional determination of their best interests.

Recognizing that this case has been pending in the juvenile court since August 7, 1984, we make statements which cannot be misunderstood regarding further proceedings in this matter. On remand the district court shall vacate and set aside the juvenile court's order and judgment entered on October 18, 1985, thereby reinstating not only the order and judgment entered by the juvenile court on May 6, 1985, but all other unappealed orders reflected by the record brought to us in this appeal, as well. The district court is further directed to remand the matter to the juvenile court with directions to order the juvenile court to hold a dispositional hearing forthwith. At such dispositional hearing there shall be no relitigation, or attempted relitigation, of any question whether there has been misconduct on the part of the father toward his children. Existence of the father's misconduct toward his children has been established, and any attempt to retry that issue shall meet

with extreme disapproval by this court.

Consequently, we reverse the district court's judgment affirming the juvenile court's order and judgment of October 18, which had vacated and set aside the juvenile court's adjudication made and order entered on May 6, 1985, and we remand this matter to the district court with direction to vacate and set aside the order entered in the juvenile court on October 18, 1985, and remand the matter to the juvenile court with directions to hold a dispositional hearing forthwith.

The judgment of the district court is reversed, and this matter is remanded with direction.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. DESMOND D. DANIELS, APPELLANT.

397 N.W.2d 631

Filed December 19, 1986. No. 86-376.

Criminal Law: Courts: Probation and Parole. Motions to revoke probation must be filed in the sentencing court. Where a probationer was tried, convicted, and sentenced in the county court, it is the county court, not the district court which served in its appellate capacity, that has jurisdiction to hear a motion to revoke probation.

Appeal from the District Court for Loup County: RONALD D. OLBERDING, Judge. Reversed and remanded with directions to dismiss.

Gary G. Washburn, for appellant.

Robert M. Spire, Attorney General, and Linda L. Willard, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

The defendant appeals from an order of the district court for Loup County revoking his probation and sentencing him to 6

months in jail and a $500 fine, and revoking his driver's license for life on count I, driving while intoxicated, third offense, to run concurrently with a 6-month sentence for count II, resisting arrest. His first assignment of error is that the county court, and not the district court, was the "sentencing court" and that the district court was without jurisdiction to revoke probation. Second, he asserts that the district court erred in sentencing him with respect to count II, since he had already completed his sentence on that count. His third assignment seeks to limit the effect of the lifetime revocation of driving privileges to the territorial boundaries of the State of Nebraska. We reverse, as the district court was without jurisdiction to consider the motion to revoke probation.

On September 7, 1983, the appellant was convicted in the county court of driving while intoxicated, third offense, and resisting arrest. He was sentenced to a term of 18 months' probation on condition that he serve 7 days in jail, pay a $500 fine, and have his license suspended for 1 year. The court further sentenced defendant to 23 days in jail for resisting arrest, with credit for 1 day served.

The defendant appealed to the district court, which affirmed the judgment on October 30, 1984, and then appealed to this court. We affirmed the district court in *State v. Daniels*, 220 Neb. 480, 370 N.W.2d 179 (1985). On August 7, 1985, a mandate from this court was filed in the district court for Loup County, directing the district court to enter judgment in conformity with our decision. On November 20, 1985, the district court held a hearing to implement the mandate, and as a result the appellant was put on probation and ordered to serve his jail sentence starting December 20, 1985. The State concedes that appellant served his time for count II, resisting arrest.

On January 31, 1986, a motion to revoke probation was filed in the district court. The appellant subsequently filed an objection, asserting lack of jurisdiction, which the district court overruled. On April 16, 1986, the district court revoked the appellant's probation and on April 24, 1986, resentenced him as previously described. This appeal ensued.

Neb. Rev. Stat. § 29-2267 (Reissue 1985) provides in part that "[w]henever a motion or information to revoke probation

is filed, the probationer shall be entitled to a prompt consideration of such charge by the *sentencing court*." (Emphasis supplied.) The appellant argues that the county court tried and sentenced him and that the district court affirmed the county court in its capacity as an intermediate appellate court. Therefore, he argues, the district court could not be considered to be the sentencing court and lacked jurisdiction to hear the motion to revoke probation.

It appears that the issue of which forum is to be considered the "sentencing court" in cases such as this one has not previously been addressed by this court. Neb. Rev. Stat. § 29-109 (Reissue 1985) directs us to construe all words, terms, or phrases "in the sense in which they are understood in common language, taking into consideration the context and subject matter relative to which they are employed." The State argues that since the affirmance by the district court is considered to vacate the judgment of the county court, see Neb. Rev. Stat. § 24-541.06(3) (Reissue 1985), the district court became the "sentencing court" and properly heard the motion to revoke probation. This construction of the phrase is strained at best and disregards the principle that words in a statute are to be given their plain and ordinary meaning. *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985).

Looking at the role of the district court in appeals from county court, it is clear that the district court is considered to be an intermediate court of appeals and not a trial court. *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984); *State v. Ledingham*, 217 Neb. 135, 347 N.W.2d 865 (1984). District court review is limited to an examination of the record for error and abuse of discretion. *State v. Smith*, 199 Neb. 368, 259 N.W.2d 16 (1977). Issues cannot be addressed by the district court unless first handled by the county court. *State v. Ledingham, supra; State v. Ferris*, 216 Neb. 606, 344 N.W.2d 668 (1984). Under Neb. Rev. Stat. § 29-613 (Reissue 1985), a district court may affirm, modify, or vacate the judgment of the county court. Although the district court is empowered to review a sentence for error or abuse of discretion, *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986), there is no statutory authority giving it jurisdiction to sentence the

defendant anew. Further, it is clear that the sentencing process consists of more than an entry of judgment vacating a lower tribunal's judgment; the sentencing court must comply with Neb. Rev. Stat. §§ 29-2201 et seq. (Reissue 1985). Thus, the county court is the factfinding and sentencing forum; the district court's function is to review the record for error.

Giving the words their plain meaning and taking into consideration the context in which they are employed, the phrase "sentencing court" refers to the county court and not to the district court in its appellate capacity. See *People v. Collins*, 25 Mich. App. 609, 181 N.W.2d 601 (1970), which reached a similar interpretation. The district court lacked jurisdiction to hear the motion to revoke probation. Its judgment is reversed and the cause remanded with directions to dismiss the motion.

Having found the first assignment of error as to jurisdiction meritorious, there is no need to address the other issues raised.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. GARY D. FOSTER, APPELLANT.
398 N.W.2d 101

Filed December 19, 1986. No. 86-414.

1. **Prior Convictions: Right to Counsel.** The State's burden in proving valid prior convictions for enhancement purposes is only to show that the defendant had or knowingly and voluntarily waived counsel at the time of such convictions.
2. **Prior Convictions: Right to Counsel: Waiver.** A sufficiently complete checklist or other docket entry may be used to establish a valid waiver of counsel for enhancement purposes.
3. **Records.** A checklist or other docket entry which is made by one authorized to make it imports verity, and unless contradicted it stands as a true record of the event.
4. _____. A checklist which is used as a substitute for a formal, written journal entry must be prepared with as much care and certainty as any record of a court in order to impart absolute verity.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Reversed and remanded for further proceedings.

John R. Brogan, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

Upon a plea of guilty to operating a motor vehicle while under the influence of intoxicating liquor, third offense (count I), the defendant, Gary D. Foster, was sentenced to jail for 90 days, fined $500, and his operator's license was permanently revoked. Upon a similar plea to resisting arrest (count II), he was sentenced to jail for 3 months, the sentence to run consecutively to the sentence on the first count. On appeal to the district court both judgments were affirmed.

On appeal to this court from the sentence on count I, the defendant makes two assignments of error: (1) The county and district courts erred in improperly enhancing the conviction to DWI, third offense; and (2) Since the conviction was improperly enhanced, the sentence imposed was improper.

The defendant contends that for purposes of enhancement proceedings, a checklist system of recording an arraignment is insufficient to show that an uncounseled defendant knowingly and intelligently waived the right to counsel. This question has previously been resolved against the defendant's position.

The State's burden in proving valid prior convictions for enhancement purposes is only to show that the defendant had or knowingly and voluntarily waived counsel at the time of such convictions. *State v. Hamblin*, 223 Neb. 469, 390 N.W.2d 533 (1986); *State v. Fraser*, 222 Neb. 862, 387 N.W.2d 695 (1986).

In *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984), this court determined that a sufficiently complete checklist or other docket entry could establish a valid waiver of counsel for enhancement purposes. It was further stated: "A checklist or other such docket entry which is made by one authorized to make it imports verity, and unless contradicted it stands as a true record of the event." *State v. Ziemba, supra* at 628, 346 N.W.2d at 218.

In *State v. Ziemba, supra*, we further stated at 619-20, 346 N.W.2d at 213-14:

> In addition to satisfying the requirements set out in *State v. Tweedy, supra*, in regard to accepting pleas of guilty in misdemeanor cases, the enhancement proceeding must satisfy the requirements set out in § 39-669.07 and *State v. Smith, supra*. *State v. Prichard, supra*. The transcript of a judgment used to prove a prior conviction must show that at the time of the conviction the defendant was represented by counsel or waived his right to counsel. A defendant may, as in *State v. Smith, supra*, object to the admission of the record of a prior conviction on the basis that the record does not affirmatively establish that he was represented by counsel or waived his right to counsel. A transcript of judgment which does not contain such an affirmative showing is not admissible and cannot be used to prove a prior conviction. *State v. Smith, supra*.
>
> Section 39-669.07(3) now provides that "[t]he defendant shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions."
>
> There is no requirement that the State prove a prior conviction by a transcript of the judgment if the defendant admits that he was in fact convicted as alleged in the complaint. However, in accepting such a waiver the trial court must address the defendant and ascertain that he was represented by counsel at the time of the prior conviction or waived his right to counsel.
>
> In either event the trial court is required to advise the defendant that he has a right to review the record of the prior conviction, bring mitigating facts to the attention of the court prior to sentencing, and object to the validity of the prior conviction as provided in § 39-669.07. The defendant, however, cannot relitigate the former conviction in the enhancement proceeding. *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983). After being advised of his rights under § 39-669.07, the defendant may waive

any or all of those rights. The trial court may then impose sentence or order that a presentence investigation be made.

At the enhancement proceeding in the county court on January 7, 1986, the State offered exhibits 1 and 2, which were received over the defendant's objections. Exhibit 1, a certified transcript from the county court for York County, shows the defendant pleaded no contest on February 27, 1978, to a charge of driving while intoxicated. The defendant objected to exhibit 1 on grounds that it failed to show he was represented by counsel, or knowingly waived that right, and that the checklist employed in making that record did not adequately show he was afforded or informed of his right to counsel. In receiving the exhibit the county court was correct in noting that exhibit 1 did comply with the requirements of law.

Exhibit 2, a certified transcript from the county court for Hamilton County, Nebraska, which was received over the same objections as exhibit 1, consists of a complaint, two checklist-type journal entries, and an order of probation.

The complaint was made on July 24, 1979, and contains an allegation that on that date the defendant committed second offense driving while under the influence. The first journal entry shows the defendant appeared before the Hamilton County Court on July 24, without counsel. The checklist indicates the defendant was informed, inter alia, of his right to retained or appointed counsel, and he knowingly, voluntarily, and intelligently waived that right and entered a plea of guilty to count I.

The county court entered checkmarks next to statements indicating that the defendant entered the plea knowingly and voluntarily and that a factual basis existed for the plea. The court did not, however, place a checkmark next to the statement: "( ) Whereupon the Court accepts the defendant's plea(s) and upon said plea(s) finds the defendant guilty as charged." The matter was set for sentencing July 31, 1979, and for arraignment on count II on that date.

The second journal entry, dated July 31, 1979, again indicates the defendant knowingly waived counsel. The checklist then shows the defendant entered a plea of not guilty

to count II, and the matter was set for trial on August 24, 1979. The nature of count II is unexplained, since the complaint previously referred to charged but one count.

The order of probation, in pertinent part, provides as follows:

> GARY D. FOSTER) ORDER OF PROBATION
> Defendant) (Misdemeanor)
>
> THIS MATTER came on for hearing this 24 day of August, 1979. The State of Nebraska appeared by Michael J. Owens County Attorney of Hamilton County, Nebraska, and the defendant appeared in person with his attorney, _____. The Court finds that the defendant herein entered his plea of not guilty (was found guilty) on the 7th day of July, 1979, to the charge of DWI 2nd offense.
>
> The Court being advised in the premises finds that said defendant is guilty of the said offense as charged in the Complaint.

Exhibit 2 is inadequate for enhancement purposes because it fails to show the defendant was represented by counsel or waived that right.

The July 24, 1979, journal entry shows the defendant waived counsel and pleaded guilty to count I, but it does not indicate that the county court accepted the plea or found the defendant guilty as charged. The order of probation, which is dated August 24, 1979, indicates that the court did in fact convict the defendant of second offense DWI, but fails to satisfy the checklist deficiency because the relevant dates and pleas do not match. The first journal entry shows the defendant pleaded guilty on July 24, 1979, while the probation order shows he pleaded not guilty on July 7, 1979. July 7 is 17 days prior to the date of the offense alleged in the complaint.

The July 31, 1979, journal entry also fails to show the presence of counsel or an intelligent waiver of counsel at the time of the conviction shown in the probation order. The journal entry shows the defendant pleaded not guilty to count II on July 31, 1979, while the order of probation gives July 7 as the date the relevant plea was entered. Thus, while exhibit 2

shows the defendant was convicted of DWI, second offense, the State has failed to prove that the defendant was either represented by counsel or validly waived that right at the time of the conviction. The county court abused its discretion in receiving exhibit 2 for enhancement purposes, over the defendant's objection, because the record failed to show affirmatively that the defendant was represented by counsel or had made a valid waiver of his right to counsel.

A checklist which is used as a substitute for a formal, written journal entry must be prepared with as much care and certainty as any record of a court in order to impart absolute verity.

The judgment on count I, the charge of driving under the influence of intoxicating liquor, third offense, is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. KEVIN C. POLYASCKO, APPELLANT.

397 N.W.2d 633

Filed December 19, 1986. No. 86-490.

1. **Motions for Continuance: Appeal and Error.** Absent an abuse of discretion, the decision of a trial judge on a motion for continuance will be upheld on appeal.
2. **Sexual Assault: Corroboration.** A victim need not be independently corroborated on the particular acts constituting a sexual assault, but must be corroborated on the material circumstances and facts tending to support the victim's testimony.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Patrick W. Meyer of Westergren, Hauptman, O'Brien, Wolf & Hadley, P.C., for appellant.

Herbert M. Fitle, Omaha City Attorney, and Gary P. Bucchino, Omaha City Prosecutor, Richard M. Jones, and David F. Smalheiser, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal from the district court for Douglas County which affirmed the judgment of the county court. Appellant, Kevin C. Polyascko, was charged with violating Omaha Mun. Code, ch. 20, art. IV, § 20-92 (1980), taking indecent liberties with a child, and third degree sexual assault in violation of Neb. Rev. Stat. § 28-320 (Reissue 1985). At the close of the testimony the county court found Polyascko guilty of violating the Omaha city ordinance, and he was sentenced to 60 days in jail and ordered to pay a fine of $300. This appeal followed.

The appellant was arrested on or about September 27, 1985, and a trial date was fixed for November 12, 1985, at 9 a.m. The date on which the trial was set is not shown by the record. On October 30, 1985, appellant's retained counsel asked permission to withdraw. Though notice to appellant of the filing of the motion is not shown, the appellant, on November 3, contacted other counsel, whom he first saw on November 9, 2 days after the first counsel was granted permission to withdraw by a county judge.

At 9 a.m. on November 12, 1985, appellant appeared in the county court and stated that he was not ready to proceed to trial. He informed the court that he had secured new counsel, but his attorney was not available for trial on that date. While the record is unclear as to how long before the date of the trial Polyascko knew of his counsel's desire to withdraw, the trial judge determined that at least as of October 30, 1985, appellant knew that his counsel wanted to withdraw. Polyascko admitted to receiving a copy of the motion to withdraw; however, he did not attend the hearing on the motion. The case was continued until 2 o'clock that afternoon to enable appellant to secure other counsel.

At trial appellant appeared with substitute counsel at 2 p.m., and the motion for continuance was not renewed. The victim and a police officer to whom the victim had related the details of the assault were called as witnesses. The appellant also testified.

Appellant assigns as error the failure of the trial court to grant a further continuance and the court's finding that the appellant was guilty of taking indecent liberties with a minor. We affirm.

As to appellant's first assignment of error, we note that this court has frequently stated that a motion for a continuance is addressed to the sound discretion of the trial court and will be upheld on appeal absent an abuse of discretion. *State v. Broomhall*, 221 Neb. 27, 374 N.W.2d 845 (1985). Appellant contends that he was not given adequate time to prepare his defense. This issue has been addressed numerous times by this court. In *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986), the appellant moved for a continuance and the appointment of counsel because his attorney had filed a motion to withdraw previously. The appellant's counsel was not granted leave to withdraw, and appellant chose to proceed to trial without counsel. The trial was not completed on the first day, and appellant was able to secure counsel for the second and final day of trial. No prejudice or abuse of discretion was found to exist. In *State v. Richter*, 221 Neb. 487, 378 N.W.2d 175 (1985), the appellant appeared at trial without an attorney, stating that he did not have the money to retain counsel. His motion for a continuance until the end of the month when the appellant expected to receive some money was denied on the ground that the appellant could have contacted the court at any time prior to the start of his trial and made arrangements for counsel to be provided. No prejudice or abuse of discretion was found to exist. In *Richter* we noted the language of the U.S. Court of Appeals for the Second Circuit in the case of *United States v. Arlen*, 252 F.2d 491, 494-95 (2d Cir. 1958), which reads:

> Although the right to assistance of counsel is absolute, United States v. Morgan, 2 Cir., 1955, 222 F.2d 673, the exercise of that right is subject to the necessities of sound judicial administration. Further, the right itself, being personal, may be waived. See Johnson v. Zerbst, 1938, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L.Ed. 1461. We think it clear that although a defendant able to retain counsel is entitled to a reasonable time to secure counsel, he may not

> indefinitely postpone trial by continued applications for more time to seek representation. Whether additional time should be granted is within the sound discretion of the trial court. Further, where a defendant able to retain counsel has been advised by the court that he must retain counsel by a certain reasonable time, and where there is no showing why he has not retained counsel within that time, the court may treat his failure to provide for his own defense as a waiver of his right to counsel and require such defendant to proceed to trial without an attorney. Such a waiver is similar in its consequences to an election made by an indigent defendant.

From these cases it is clear that the trial court's action did not constitute an abuse of discretion. Appellant has not demonstrated that he was prejudiced by proceeding with his trial. It is evident from the record that the appellant was aware of his counsel's desire to withdraw at least as early as October 30. Appellant made no effort to obtain a continuance prior to the date of trial and replaced his original counsel with an attorney who could not be in court on the date scheduled for appellant's trial. In view of the case law cited above and the facts of this case, we find this assignment of error to be without merit.

The appellant's second assignment of error, that the evidence presented at trial was insufficient to find the appellant guilty beyond a reasonable doubt of taking indecent liberties with a minor, is also without merit. We note that this court refrains from resolving conflicts in the evidence, and if, taking the view most favorable to the State, there is sufficient evidence to sustain the conviction, it will be upheld on appeal. *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985). In *State v. Wounded Arrow*, 207 Neb. 544, 300 N.W.2d 19 (1980), this court recognized that the only corroboration required in an instance of alleged sexual assault is corroboration as to the material facts and circumstances tending to support the victim's testimony about the principal fact at issue.

In *Wounded Arrow* a first degree sexual assault conviction was upheld on appeal based upon corroborating evidence which consisted of the facts told by the victim to his mother, a

jail administrator, and a police detective. In *State v. Watkins*, 207 Neb. 859, 301 N.W.2d 338 (1981), the defendant was convicted of sexually assaulting his minor stepdaughter. The only testimony corroborating the victim's testimony consisted of that of her mother as to the facts of the assault as related to her by her daughter, and the testimony of a police officer to whom the victim had also related her story. The judgment was affirmed on appeal.

In *Watkins* we stated that the prosecutrix may testify in chief on direct examination if, within a reasonable time under all the circumstances after the act was committed, she made a complaint to another concerning the facts and nature of the assault. Here, too, we stated that the prosecutrix's testimony need only be corroborated as to material facts and circumstances which tend to support her testimony.

Finally, in *State v. Evans*, 212 Neb. 476, 481, 323 N.W.2d 106, 109-10 (1982), the evidentiary issues raised by a case of alleged sexual assault were summed up as follows:

> The initial form of corroborative evidence of the testimony of the prosecutrix offered by the prosecution was the testimony of her mother and her sister regarding the details of the prosecutrix's May 4, 1980, complaint of the alleged assault. "The rule is well established in this state that in a prosecution for sexual assault, *the prosecutrix may testify* in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, *to the fact and nature of the complaint, but not as to its details;* and that *others may likewise testify in chief to such fact and nature of the complaint, but not as to its details. State v. Chaney*, 184 Neb. 734, 171 N.W.2d 787 (1969); *Sherrick v. State*, 157 Neb. 623, 61 N.W.2d 358 (1953).
>
> "This court has also stated that *one to whom the complaining witness has complained may testify to the fact and nature of the complaint* if the complaint was made voluntarily and without unreasonable or inconsistent delay. See, *State v. Deardurff*, 186 Neb. 92, 180 N.W.2d 890 (1970); *Texter v. State*, 170 Neb. 426, 102 N.W.2d 655 (1960)." (Emphasis supplied.) *State v.*

Watkins, 207 Neb. 859, 863, 301 N.W.2d 338, 341 (1981).

Here, the victim made a timely complaint of the assault, which included the nature and facts of the assault. The victim testified that the appellant entered her room wearing only a blue knit shirt and underwear. The appellant sat on the victim's bed and asked her if she "wanted to play around." The victim then testified that she sat on a chair 3 to 4 feet from the bed. Next, the appellant knelt beside the victim and began to rub her foot. The victim testified that the appellant moved his hand up her thigh and touched her genitals through her clothing and asked the victim if he could "kiss [her] there." The victim testified that she said no, and the appellant next began to rub her ear. The victim testified at trial that the appellant asked her if she would tell anyone of the assault. The victim testified she said that she would not. The victim stated that the appellant next left the room but came back and began to rub the victim's ear again. He again asked if he could "kiss [her] there." The victim again said no, and the appellant left her room. The victim also testified that during the assault, the appellant asked her if she wanted to "kiss him there."

The next day, at school, the victim approached a counselor, told her what happened, and the counselor contacted the police. The victim related the facts of the assault to the police officer, who also testified at trial and corroborated the victim's account of the assault.

Taking the view most favorable to the State, we find that there is sufficient evidence to sustain the appellant's conviction. We find that the appellant's second assignment of error is also meritless. We affirm the conviction.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRY L. BEAN, APPELLANT.
398 N.W.2d 104

Filed December 19, 1986. No. 86-541.

1. **Rules of the Supreme Court: Appeal and Error.** Relief granted pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986) constitutes the disposition of a direct appeal on its merits.
2. _____: _____. In disposing of a case under Neb. Ct. R. of Prac. 3B (rev. 1986), the Nebraska Supreme Court examines the entire record, not only to resolve those matters which are specifically called to its attention by counsel but also to determine whether any possible errors exist.
3. **Rules of the Supreme Court: Postconviction: Appeal and Error.** Any matter which can be determined from the record on direct appeal is considered by the Nebraska Supreme Court when ruling on a motion filed pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986). Any such matter is not subject to relitigation in an action brought pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985).
4. **Postconviction.** In order to state a cause of action for postconviction relief, the motion must allege facts which, if proved, constitute an infringement of a prisoner's constitutional rights; allegations which are mere conclusions are not sufficient.
5. _____. When a motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Terry L. Bean, pro se.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

Defendant, Terry L. Bean, appeals from the denial of relief under the provisions of the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). He assigns as errors the failure of the district court to (1) find the evidence insufficient to sustain the conviction, (2) find that he should have been allowed to dismiss the deputy public defender assigned to him in the case leading to his conviction, (3) grant him an evidentiary hearing, and (4) find that he was denied the effective assistance of counsel. We affirm.

Pursuant to a plea bargain whereunder the State dismissed a habitual criminal charge and a use of a weapon to commit a felony charge, Bean pled guilty to first degree assault. Such assault is a Class III felony punishable by imprisonment of from 1 to 20 years or a $25,000 fine, or both such imprisonment and fine. Neb. Rev. Stat. §§ 28-308 and 28-105(1) (Reissue 1985). He was thereafter adjudged guilty and sentenced to imprisonment for a term of 3 to 5 years. After that conviction was appealed to this court, Bean's counsel moved to withdraw pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986) on the ground that the appeal was "wholly frivolous and totally without merit." That motion was granted, and the judgment appealed from was affirmed. *State v. Bean*, 221 Neb. xxix (case No. 85-938, Jan. 23, 1986).

As pointed out in *State v. Sanders*, 220 Neb. 308, 369 N.W.2d 641 (1985), relief granted pursuant to rule 3B constitutes the disposition of a direct appeal on its merits, for in such a case this court examines the entire record, not only to resolve those matters which are specifically called to its attention by counsel but also to determine whether any possible errors exist. Therefore, any matter which can be determined from the record on direct appeal is considered when ruling on a motion filed pursuant to rule 3B and is not subject to relitigation in an action brought pursuant to the Postconviction Act.

Bean's first assignment of error, that the evidence was insufficient to support the conviction, and his second assignment of error, that the district court should have permitted him to dismiss the deputy public defender assigned to him, were considered in his direct appeal. Therefore, neither of those assignments is subject to relitigation or further discussion.

This brings us to Bean's third assignment of error, that he was denied an evidentiary hearing in this proceeding.

We begin our analysis of this issue by recalling that in order to state a cause of action for postconviction relief, the motion must allege facts which, if proved, constitute an infringement of a prisoner's constitutional rights; allegations which are mere conclusions are not sufficient. *State v. Galvan*, 222 Neb. 104, 382 N.W.2d 337 (1986); *State v. Williams*, 218 Neb. 618, 358

N.W.2d 195 (1984); § 29-3001.

Bean's argument in connection with this assignment rests principally on three contentions: (1) that the deputy public defender assigned to him refused to file certain motions Bean requested; (2) that said attorney failed to spend enough time with Bean and personally attend certain hearings; and (3) that said attorney's inadequate performance and conspiracy with the prosecutors in effect coerced Bean's plea.

The first contention fails because the allegations made, even if true, fail to allege facts from which it can be concluded that any such motion had merit, would have been sustained, and would have affected the outcome of the case leading to Bean's conviction. The second contention fails because there are no factual allegations from which it can be concluded that Bean's defense was prejudiced by the failure of his assigned attorney to spend more time with him or by the representation afforded by another member of the public defender's office during certain phases of the underlying case. In fact, Bean suggests at one point in his brief that the substituting attorney was more competent than the one assigned to him. The third contention fails not only because Bean fails to allege any facts from which it can be concluded his assigned attorney was engaged in a conspiracy with the prosecutors but because the record belies the claim that his plea was coerced. Before the district court accepted the plea, Bean assured the court that he was satisfied with his assigned attorney's performance, that he felt he had had enough time to discuss the matter with his attorney, and that, other than for the plea bargain, no one connected with law enforcement had made any threat or promise to induce the plea.

When a motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required. *State v. Apodaca*, 223 Neb. 258, 388 N.W.2d 837 (1986). This being such a case, the district court was correct in denying Bean an evidentiary hearing.

The foregoing analysis of Bean's third assignment of error disposes of his fourth assignment, that the district court erred in not finding that Bean had been denied effective assistance of counsel.

The judgment of the district court denying postconviction relief, being correct, is hereby affirmed.

AFFIRMED.

MARVIN R. HELMS, APPELLEE, V. MARY A. HELMS, APPELLANT.
397 N.W.2d 637

Filed December 19, 1986. No. 86-574.

Appeal from the District Court for Butler County: WILLIAM H. NORTON, Judge. Affirmed.

Virginia G. Johnson, for appellant.

Kent F. Jacobs of Blevens, Blevens & Jacobs, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The respondent wife, Mary A. Helms, appeals from the decree dissolving her marriage to the petitioner husband, Marvin R. Helms, on the basis that the trial judge erred in his treatment of the husband's military retirement and disability entitlements. Having reviewed the record de novo, as we are required to do, we conclude that the trial judge did not abuse his discretion in that regard.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES JESS PALMER, ALSO KNOWN AS CHARLES TINSLEY, ALSO KNOWN AS J. R. KIRKPATRICK, APPELLANT.

399 N.W.2d 706

Filed December 29, 1986. No. 84-733.

1. **Convictions: Circumstantial Evidence.** One charged in a criminal case may be convicted on the basis of circumstantial evidence.
2. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury.
3. **Verdicts: Appeal and Error.** The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
4. **Criminal Law: Statutes: Sentences.** In a general sense an ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed.
5. _____: _____: _____. Not all retroactive legislation is in violation of the prohibition against ex post facto laws.
6. _____: _____: _____. A legislature may not enact any law which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed.
7. **Criminal Law: Statutes.** Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage, for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.
8. **Criminal Law: Trial: Pretrial Procedure.** No one has a vested right in a procedure; procedural matters can be changed at any time before trial and are binding on the defendant.
9. **Statutes.** In the absence of anything indicating the contrary, statutory language is to be given its plain and ordinary meaning.
10. **Criminal Law: Words and Phrases.** A "crime" is an act or omission for which one is subject to punishment by public authority.
11. _____: _____. "Violence" is the exertion of physical force so as to injure or abuse.
12. _____: _____. "Crime of violence" is an act which injures or abuses through the use of physical force and which subjects the actor to punishment by public authority.
13. **Statutes.** Where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language.

14. **Double Jeopardy: Appeal and Error.** Retrial after reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute double jeopardy.
15. **Prosecuting Attorneys.** That a county attorney vigorously prosecutes one accused of a crime does not constitute prosecutorial misconduct.
16. **Evidence: Judges: Trial.** The receipt of evidence which may later be excluded because of a difficult or complicated rule of law does not constitute judicial misconduct.
17. **Witnesses: Hypnosis.** A witness is not rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case. Such a witness may testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis.
18. **Convictions: Identification Procedures: Photographs.** Each case must be considered on its own facts, and convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
19. _____: _____: _____. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
20. **Death Penalty: Expert Witnesses.** The proportionality of a death sentence is for court determination and is not a subject for expert testimony.
21. **Rules of Evidence: Sentences.** The traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.
22. **Death Penalty: Evidence: Aggravating and Mitigating Circumstances.** A defendant may offer any evidence on the issue of mitigation, even though the mitigating factor is not specifically listed in Neb. Rev. Stat. § 29-2523(2) (Reissue 1985).
23. **Constitutional Law: Death Penalty: Aggravating and Mitigating Circumstances.** The statutory aggravating circumstances set out in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) are not unconstitutionally vague.
24. **Constitutional Law: Criminal Law: Convictions.** A convicted defendant is not entitled to all of the same rights accorded one merely accused of a crime but not yet convicted.
25. **Constitutional Law: Death Penalty: Juries.** There is no constitutional requirement that the death penalty be imposed by a jury.
26. **Death Penalty: Statutes: Words and Phrases: Aggravating and Mitigating Circumstances.** Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), that a murder be "especially heinous, atrocious, cruel" or "manifest exceptional depravity by ordinary standards of morality and intelligence," describes in the disjunctive at least two distinct components of the aggravating circumstance which may

operate in conjunction with or independent of one another.

27. **Death Penalty: Aggravating and Mitigating Circumstances.** The presence of any of the components of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) will sustain a finding that aggravating circumstance (1)(d) exists.
28. **Death Penalty: Aggravating and Mitigating Circumstances: Words and Phrases.** The words "especially heinous, atrocious, cruel," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), mean a conscienceless or pitiless crime which is unnecessarily torturous to the victim.
29. _____: _____: _____. The phrase "exceptional depravity," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), refers and pertains to the state of mind of the actor and may be proved by or inferred from the defendant's conduct at or near the time of the offense.
30. _____: _____: _____. For the purpose of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), "exceptional depravity" exists when the act is totally and senselessly bereft of any regard for human life as shown by the presence of the following circumstances, either separately or collectively: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim.
31. **Death Penalty: Supreme Court: Sentences: Appeal and Error.** The proportionality review made under the requirements of Neb. Rev. Stat. §§ 29-2521.01, 29-2521.02, and 29-2521.03 (Reissue 1985) is limited to a comparison of the facts and circumstances of the death penalty-imposed case under review with those of all applicable cases in which the death penalty was imposed.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Affirmed.

John A. Wolf and David A. Bush, for appellant.

Charles Jess Palmer, pro se.

Robert M. Spire, Attorney General, and J. Kirk Brown, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and BLUE, D.J.

PER CURIAM.

The defendant, Charles Jess Palmer, appeals from a jury verdict finding him guilty of felony murder under Neb. Rev. Stat. § 28-303(2) (Reissue 1985), and from a sentence imposed by a three-judge court ordering Palmer to be executed for the crime in accordance with the provisions of Neb. Rev. Stat. §§ 29-2521 et seq. (Reissue 1985). This case has twice before

been to this court. See, *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981) (*Palmer I*); *State v. Palmer*, 215 Neb. 273, 338 N.W.2d 281 (1983) (*Palmer II*). The relevant facts are as follows.

From August of 1977 to the time of the murder, the defendant and his wife lived and worked near Guide Rock, Nebraska. Their son, Jess, was born July 4, 1978. The victim, Eugene Zimmerman, operated a coin shop in his home in Grand Island, Nebraska.

The Palmers' first contact with the victim occurred in October of 1978. Mrs. Palmer telephoned Zimmerman and arranged a meeting. The Palmers intended to offer coins and silver objects for sale. The Palmers, with their baby, drove to the Zimmerman house, and the defendant waited in the truck while Mrs. Palmer negotiated the sale. In late December of 1978 Mrs. Palmer called Zimmerman and offered to sell additional coins and silver. On this occasion the defendant and the baby accompanied Mrs. Palmer into the Zimmerman residence. In late February of 1979 all three again went into the residence while Mrs. Palmer sold Zimmerman some silver baby spoons. When she asked him if he would be interested in buying two or three gold wedding bands, Zimmerman responded that he would. On March 5, 1979, Mrs. Palmer returned to sell Zimmerman the wedding rings. The defendant accompanied her into the house and walked around the office and the parlor adjacent to the business area while Mrs. Palmer conducted business. Mrs. Palmer asked Zimmerman if he would be interested in buying two antique rings. He replied that he would look at them, and arranged a meeting for the next afternoon.

On March 6, 1979, the day of the murder, the defendant, Mrs. Palmer, and their baby arrived at the Zimmerman house between 3 and 3:30 p.m. Zimmerman examined the rings and showed Mrs. Palmer how he could tell that her stones were imitation rather than real. He told her he would buy the settings from her if a test proved they were gold. Zimmerman rose from his desk, turned around, and picked a jar of solution from the cabinet. According to Mrs. Palmer, the defendant suddenly lunged at the victim while his back was turned and struck the victim's face. Zimmerman's glasses were dislodged. Defendant

and Zimmerman struggled, Zimmerman was thrown to the floor, and defendant demanded money from him. The evidence shows that, at the time, defendant was 40 years old, 6 feet 7 inches tall, and weighed approximately 245 pounds; the victim was 59 years old, 5 feet 11 inches tall, and weighed approximately 135 pounds. Zimmerman's face was bleeding. The defendant bound Zimmerman's hands, lifted him to his feet, and forced him up the stairs. Mrs. Palmer testified that the defendant remained upstairs alone with the victim for 15 minutes before she was to come upstairs. Upon entering the bedroom, she saw Zimmerman lying on a bed, his hands and feet tied. The defendant proceeded to search the upstairs. He told Mrs. Palmer to watch Zimmerman. The defendant then went downstairs and remained there for 20 minutes. During this time, the victim complained to Mrs. Palmer of stomach pain, and asked, "Why are you doing this to me?" Zimmerman then asked Mrs. Palmer to get him some medicine from his bathroom, which she did.

The defendant went back upstairs, wearing gloves, and sent Mrs. Palmer downstairs. She waited downstairs for him for 15 minutes, and testified that during this time she heard noises upstairs: "There was a — a lot of thumping noises. Thump, thump, thump, thump, and there was some kind of a — a guttural noise. I kept hearing a — a low, monotonous, almost a chant-like sound. A very deep and very throaty guttural type over and over, again." When the defendant returned downstairs around 4:30 p.m., the defendant, Mrs. Palmer, and the baby left, this being approximately 1 hour after they had arrived at the Zimmerman residence.

On March 7, 1979, the Palmers rented a storage unit in Hastings, Nebraska. After packing and making arrangements to have their employer's animals cared for, they left for Austin, Texas, approximately 2 weeks after the incident. Mrs. Palmer testified that the items stolen from the coin shop were placed in a diaper bag and accompanied them to Austin.

In Austin the defendant, using the name J.R. Kirkpatrick, contacted a coin dealer named Jesse Garza and sold him coins and jewelry. A few days later, Garza read a trade journal which covered the Zimmerman robbery and murder and cataloged the

stolen items. Garza recognized that several of the items he bought from the defendant were on the list, and called the police. When the defendant contacted Garza again, Garza arranged to meet him at an airport restaurant, where the police arrested defendant on March 27, 1979.

The victim's wife, Monica Zimmerman, returned home around 5 p.m. on March 6, 1979, and discovered that the coin shop had been looted. She called the police. The victim's body was found upstairs, with an electrical cord tied tightly around the neck, and coins, jewelry, money, and other valuables were discovered to be missing. A pathologist testified that the victim had a bruise below his left collarbone, a bruise over the right cheekbone, a bruised left eyebrow and eyelid, a scratch on the left side of his nose and under his left jaw, and a cut on his left temporal area. Those injuries preceded death. Mr. Zimmerman's windpipe and voice box were broken and evidenced bleeding. The time of death was fixed at 4:30; the cause of death was strangulation. In explaining the presence of the cuts, bruises, and abrasions, the pathologist testified that there were two possibilities: "One, if the head were thrown several times against an unyielding object or that the head received a blow in a number of different areas from one or more blunt objects."

The sentencing panel found that no mitigating circumstance existed to affect defendant's sentence, but found beyond a reasonable doubt that two statutory aggravating circumstances existed, namely, (1) that the murder was committed in an apparent effort to conceal defendant's identity as the perpetrator of the robbery, and (2) that while Zimmerman's murder was not "especially heinous, atrocious, cruel," it "manifested exceptional depravity by ordinary standards of morality and intelligence." § 29-2523(1)(b) and (d).

In each of the three trials, the State introduced circumstantial evidence tending to implicate defendant in the crime. In the first trial three witnesses who had undergone hypnosis were allowed to testify, leading this court to reverse and remand. See *Palmer I*. In the second and third trials the deceased's widow, Monica Zimmerman, was permitted to testify, although the trial judge limited the subject matter of her testimony. Additionally, in the

second and third trials Cherie Palmer was allowed to testify against her husband. It was her testimony in the second trial which we found to be contrary to the provisions of Neb. Rev. Stat. § 27-505 (Reissue 1979), and we accordingly set aside the conviction and remanded the cause for a third trial.

After our opinion in *Palmer II* was released, but before the third trial in this case was held, the Nebraska Legislature amended § 27-505, eliminating the provision which precluded one spouse from testifying against another in a criminal case except in limited circumstances not applicable to the instant case. See 1984 Neb. Laws, L.B. 696.

Defendant's counsel have filed a brief in this court alleging that some 27 errors were committed during the third trial, any one of which would entitle defendant to an order of this court reversing the decision and setting aside the sentence. Additionally, defendant has filed a pro se brief in which he has raised five specific assignments of error, all of which are essentially covered by his counsel's brief. These 32 assignments of error can be rephrased and reduced to 8, without in any way ignoring any issues raised by either defendant's counsel or defendant himself. These rephrased assignments are as follows: (1) That the evidence adduced at the trial during its various stages is insufficient to support the verdict. (2) That the action of the Legislature in amending § 27-505 with the passage of L.B. 696 is prohibited by the ex post facto clauses of both the U.S. and Nebraska Constitutions and that the trial court erred in permitting Cherie Palmer to testify against defendant. (3) That requiring defendant to stand trial a third time constituted placing him in double jeopardy, in violation of his federal constitutional rights. (4) That the district court erred in permitting Monica Zimmerman to testify regarding matters covered during her pretrial hypnotic interview. (5) That the district court erred in overruling defendant's motion to suppress the use of pretrial and in-court identifications of him. (6) That the district court erred in overruling defendant's motion to dismiss on the ground that he had been deprived of his right to a speedy trial under both Nebraska statute and the sixth amendment to the U.S. Constitution. (7) That the district court erred in overruling defendant's motion to suppress evidence

obtained from him at the time of his arrest in Austin, Texas. (8) That the district court erred in sentencing defendant to death. We shall discuss these issues in the order listed above.

(1) Sufficiency of the Evidence.

Defendant's first argument is that taking the evidence as a whole, it was insufficient to support the verdict finding him guilty of felony murder. When the evidence adduced at the trial is considered, the first assignment must be quickly overruled. To begin with, a person charged in a criminal case may be convicted on the basis of circumstantial evidence. See *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981). Furthermore, in determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. See, *State v. Wilkening*, 222 Neb. 107, 382 N.W.2d 340 (1986); *State v. Kakela*, 218 Neb. 843, 359 N.W.2d 786 (1984); *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984). The evidence, when viewed in light of these rules, is more than sufficient to justify the case's being submitted to the jury and more than sufficient for the jury to find the defendant guilty of felony murder. Therefore, unless some other error is found, the decision of the jury finding defendant guilty of felony murder must be affirmed.

(2) Amendment of § 27-505 and Cherie Palmer's testimony.

As we have already noted, in *Palmer II* this court held that § 27-505, as it was then constituted, prohibited Cherie Palmer from testifying against her husband. At that time § 27-505 provided as follows:

> (1) Neither husband nor wife can be examined in any case as to any confidential communication made by one to the other while married, nor shall they after the marriage relation ceases to [sic] be permitted to reveal in testimony any such communication while the marriage subsisted except as otherwise provided by law. This privilege may be waived only with the consent of both spouses. After the

death of one, it may be waived by the survivor.

(2) During the existence of the marriage, a husband and wife can in no criminal case be a witness against the other. This privilege may be waived only with the consent of both spouses.

(3) These privileges may not be claimed:

(a) In any criminal case where the crime charged is rape, adultery, bigamy, incest . . . .

Following our decision in *Palmer II* and before the subject trial, the Nebraska Legislature amended § 27-505, and in particular amended subsection (3) to provide as follows: "These privileges may not be claimed: (a) In any criminal case where the crime charged is a crime of violence, bigamy, incest . . . ." See § 27-505 (Reissue 1985). While defendant raises some issue as to the meaning of the amendment (a matter which we will later discuss), it nevertheless appears fairly clear that unless by adopting L.B. 696 and amending § 27-505, the Nebraska Legislature has adopted an ex post facto law and thereby violated defendant's constitutional rights, Mrs. Palmer was properly permitted to testify.

Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, clearly provide that no ex post facto law may be passed. What is not so clear, however, is what constitutes an ex post facto law.

The Latin phrase "ex post facto" means literally "a thing done afterward." Webster's Third New International Dictionary, Unabridged 802 (1981). In a general sense an ex post facto law is one which "renders an act punishable in the manner in which it was not punishable when it was committed." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138, 3 L. Ed. 162 (1810). The traditional justification for prohibiting retroactive laws is that such laws "are contrary to the first principles of the social compact, and to every principle of sound legislation." The Federalist No. 44, at 349 (J. Madison) (J. Hamilton ed. 1882). At first blush this would seem to prohibit anything from being done after an act is committed.

However, an examination of the history as it relates to the doctrine of ex post facto and the cases which have been decided from the earliest of times leads to the conclusion that not all retroactive legislation is in violation of the prohibition against

ex post facto laws. The clause, as it has been interpreted, applies principally, if not exclusively, to criminal laws or laws impacting criminal prosecutions. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798). The most frequently stated rendition of the ex post facto prohibition is that a legislature may not enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed . . . ." *Cummings v. The State of Missouri*, 71 U.S. (4 Wall.) 277, 325-26, 18 L. Ed. 356 (1867). Approximately a decade after the ratification of the Constitution, the U.S. Supreme Court was called upon to construe the ex post facto clause. See *Calder v. Bull, supra*. In doing so the U.S. Supreme Court held that a Connecticut resolution setting aside the decree of the probate court and granting a right of appeal where one had not previously existed did not offend the ex post facto clause. This ruling was somewhat modified by a later decision in *Kring v. Missouri*, 107 U.S. 221, 2 S. Ct. 443, 27 L. Ed. 506 (1883). The case most relevant, however, to the instant case is the case of *Hopt v. Utah*, 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262 (1884). Hopt was charged with first degree murder. At the time the crime was committed, the Utah criminal procedure act prohibited the admission of testimony of convicted felons. Prior to trial, the Utah Legislature repealed that provision, thereby removing any obstacle to the competency of convicted felons. At trial Emerson, a previously convicted accomplice, was allowed to testify. Following conviction, an appeal was ultimately taken to the U.S. Supreme Court. The Court held that the repeal of the felon competency rule after the commission of the offense but before trial was not an ex post facto law.

After discussing *Kring, supra*, the Court noted that Kring had been deprived of a substantial right possessed by him at the time the offense was committed. The Court went on to distinguish Hopt's situation, noting:

> But there are no such features in the case before us. Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach

> criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.
>
> The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charged.

Hopt v. Utah, supra at 589-90.

Similarly, in the instant case nothing done by the Legislature in amending § 27-505 created any criminal act, nor altered the standard of proof necessary for conviction, nor altered the punishment prescribed for committing the crime. The decision in *Hopt, supra*, is wholly consistent with our holdings in this jurisdiction to the effect that no one has a vested right in a procedure and that procedural matters can be changed at any time before trial and are binding on the defendant. See, *State v.*

Shiffbauer, 197 Neb. 805, 251 N.W.2d 359 (1977); *Durousseau v. Nebraska State Racing Commission*, 194 Neb. 288, 231 N.W.2d 566 (1975).

The holding in *Hopt, supra*, was further affirmed by the U.S. Supreme Court decision in *Thompson v. Missouri*, 171 U.S. 380, 18 S. Ct. 922, 43 L. Ed. 204 (1898). *Thompson* was a case very similar to the case at bar. Thompson was charged with first degree murder. After conviction the Missouri Supreme Court reversed, holding the admission of certain writing samples for comparative purposes to be prejudicial error. Prior to his retrial, the Missouri Legislature enacted a statute allowing admission of such evidence. The same samples were then admitted in the second trial. Thompson was convicted, and the Missouri Supreme Court upheld the conviction.

On appeal the U.S. Supreme Court held that the subsequent legislative change of the rules of evidence regarding writing samples for comparative purposes did not violate the ex post facto prohibition of the federal Constitution. The Court admitted that a number of cases containing language supporting Thompson's "ex post facto" argument could be found, but, "[a]pplying the principles announced in former cases—without attaching undue weight to general expressions in them that go beyond the questions necessary to be determined," 171 U.S. at 386, the U.S. Supreme Court held that the rights abrogated were not substantial enough to render retroactive application of the statute unconstitutional. In doing so the Court said at 387:

> If persons excluded, upon grounds of public policy, at the time of the commission of an offence, from testifying as witnesses for or against the accused, may, in virtue of a statute, become competent to testify, we cannot perceive any ground upon which to hold a statute to be *ex post facto* which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offence was committed.

Four states have previously considered whether a change in the marital privilege statutes constitutes an ex post facto law,

and in each instance determined that it does not. See, *Huckaby v. State*, 262 Ark. 413, 557 S.W.2d 875 (1977); *State v. Clevenger*, 69 Wash. 2d 136, 417 P.2d 626 (1966); *Ritchey v. State*, 407 S.W.2d 506 (Tex. Crim. 1966); *Wester v. The State*, 142 Ala. 56, 38 So. 1010 (1905).

As part of his "ex post facto" argument, defendant raises two other related issues. He maintains that, in any event, L.B. 696 is unconstitutionally vague because there is no definition of "crime of violence." Furthermore, he argues that the exceptions adopted by L.B. 696 apply only in cases where the spouse or child is the other party.

The vagueness argument is controlled by the rule that in the absence of anything indicating the contrary, statutory language is to be given its plain and ordinary meaning. *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986). By that standard a "crime" is an act or omission for which one is subject to punishment by public authority. See Webster's Third New International Dictionary, Unabridged 536 (1981). By that same standard "violence" is the exertion of physical force so as to injure or abuse. *Id.* at 2554. Thus, "crime of violence" is an act which injures or abuses through the use of physical force and which subjects the actor to punishment by public authority. This court has said that robbery is a crime of violence. *Draper v. Sigler*, 177 Neb. 726, 131 N.W.2d 131 (1964). Certainly, then, murder is a crime of violence. *Com. v. Ferrer*, 283 Pa. Super. 21, 423 A.2d 423 (1980); *People v. Manns*, 12 Mich. App. 543, 163 N.W.2d 232 (1968). Accordingly, L.B. 696 is not vague.

Defendant's argument regarding the application of L.B. 696 is that the crimes described in § 27-505 apply only to cases where one spouse commits a crime against the other spouse. Therefore, according to him, L.B. 696 applies only where one spouse commits a crime of violence against the other spouse. We do not read either the history of the amendment nor the language itself to so limit § 27-505 as amended by L.B. 696. The clear meaning of the statute is that the privilege may not be claimed where the crime charged is "a crime of violence, bigamy, incest, *or* any crime committed by one against the person or property of the other." (Emphasis supplied.) Defendant's argument flies in the face of the clear meaning of

the statute. If defendant's argument were correct, there would have been no need for the enumeration of not only crimes of violence but those of bigamy and incest as well, crimes which cannot be committed except by one spouse against the other or upon some other member of the family. Nothing within L.B. 696, as it amended § 27-505, limits crimes of violence to acts committed by one spouse against the other spouse. The words are clear and require no interpretation. We have consistently held that where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language. See *Palmer II*. See, also, *Kellogg Company v. Herrington*, 216 Neb. 138, 343 N.W.2d 326 (1984); *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981). L.B. 696, as it amended § 27-505, is clear and unambiguous and applies to all crimes of violence, regardless of who the victim may be. This assignment of error is therefore without merit and must be overruled.

(3) Double Jeopardy.

Defendant next argues, both through his attorney and in his pro se brief, that the State's decision to try him a third time violated the double jeopardy clauses of both the federal and Nebraska Constitutions. Although the thrust of the arguments is not readily apparent, it appears to follow two separate tracks. One argument is based upon the notion that the evidence adduced at the earlier trial was insufficient to submit the case to the jury, and, therefore, a bar to further prosecution. The second argument, raised by defendant himself, appears to be to the effect that there was both prosecutorial and judicial misconduct which compelled defendant to seek a new trial, and, therefore, this bars the State from retrying him. Neither contention is valid.

In his first argument regarding insufficiency of the evidence, defendant relies upon the U.S. Supreme Court opinion in *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). In *Burks* the U.S. Supreme Court held that an appellate finding of insufficient evidence to convict is tantamount to an acquittal and, therefore, that the double jeopardy clause precludes a second trial once the reviewing

court has found the evidence legally insufficient. In reaching that conclusion, the Court set out its rationale precisely, saying at 16:

> Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

It is clear beyond question, however, that the decision in *Burks* does not give any support to the argument raised by defendant in the instant case. The Court specifically addressed that issue and distinguished a reversal based upon trial error from a verdict of acquittal based upon an erroneous decision.

In doing so the U.S. Supreme Court in *Burks, supra*, said at 15:

> Various rationales have been advanced to support the policy of allowing retrial to correct trial error, but in our view the most reasonable justification is that advanced by *Tateo*, supra, at 466: "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." See *Wilson, supra*, at 343-344, n. 11; *Wade v Hunter*, 336 U.S. 684, 688-689 (1949). In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e. g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

See, also, *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986).

In view of the fact that we have already held that there was sufficient circumstantial evidence to submit the case to the jury and sufficient circumstantial evidence from which the jury could find defendant guilty of felony murder, our reversal of *Palmer II* because of the trial court's error in permitting Mrs. Palmer to testify does not constitute double jeopardy so as to preclude the State from prosecuting defendant in the instant case.

Nor does defendant's contention that there was prosecutorial or judicial misconduct of such a nature as to bar a retrial have merit. The record in all three cases is devoid of any evidence to establish either prosecutorial or judicial misconduct. That a county attorney vigorously prosecutes one accused of a crime does not constitute prosecutorial misconduct. Nor does the fact that a trial court permits the introduction of evidence which may later be excluded because of a difficult or complicated rule of law constitute judicial misconduct. The argument raised by defendant is wholly unsupported by any evidence. Defendant was convicted in *Palmer II*. That conviction was reversed because of a procedural error considered to be prejudicial. Absent that procedural error, there was sufficient circumstantial evidence to submit the case to the jury and to convict him. Therefore, defendant was never placed in double jeopardy, and his assignment of error in that regard must be overruled.

(4) Matters Covered During Monica Zimmerman's Pretrial Hypnotic Interview.

The basis of defendant's assignment of error regarding the testimony of Monica Zimmerman is based almost totally upon our holding in *Palmer I*. However, *Palmer I* must be read in light of our subsequent decision in *State v. Patterson*, 213 Neb. 686, 331 N.W.2d 500 (1983), wherein we explained our holding in *Palmer I* and set out the rule as it was thereafter to be applied in Nebraska. Were we to subscribe to the argument made by defendant herein as to what he believes we said in *Palmer I*, a rule of ridiculous proportion would be reached. What we were seeking in *Palmer I*, as more clearly set out in *State v. Patterson, supra*, was to prohibit the introduction of testimony which came about for the first time after hypnosis. As we indicated in

Palmer I, our concern was preventing evidence which was hypnotically induced rather than hypnotically recalled. Where, however, the evidence is clear that the witness knew about the matters before being subjected to hypnosis, we can perceive of no rule which should preclude the witness from thereafter being permitted to testify. The district court was extremely careful in limiting Monica Zimmerman's testimony in the subject trial to those matters for which there was sufficient evidence to establish that she knew of the matters and had related them to another before being subjected to hypnosis. The rule in Nebraska as set out in *State v. Patterson, supra*, is that a witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case; rather, the witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis.

Nowhere in *Palmer I* can it be found that we precluded Monica Zimmerman from testifying. In fact, we ordered reversal with instructions to the district court to determine what of her testimony was properly admissible. In making that determination the district court was required to consider our refinement of the rule as set out in *State v. Patterson, supra*. See, also, *State v. Shiffbauer*, 197 Neb. 805, 251 N.W.2d 359 (1977). There was no error committed by the district court in permitting Monica Zimmerman to testify.

(5) Pretrial and In-court Identifications of Defendant.

Defendant argues that the in-court identification of him was tainted by a photographic lineup which took place at the Austin, Texas, police department following his arrest and prior to his trial in *Palmer I*.

The record discloses that following a call from the Austin Police Department informing the Grand Island Police Department that articles stolen from the Zimmerman residence had been confiscated and a suspect arrested, a number of Nebraska investigators and Monica Zimmerman flew to Austin, Texas. Upon arriving in Austin the officer in charge of the Nebraska contingent determined that because of

defendant's unusual height it would be inappropriate to have Monica Zimmerman view him in a traditional lineup. In a purported effort to alleviate the height discrepancy between defendant and the officers chosen to fill the lineup group, the officers decided to individually photograph defendant and the four officers. All five were photographed standing in front of a white wall and positioned next to a doorframe. When shown the five photographs, Monica Zimmerman immediately identified defendant as being the customer whom she had reported to the police as looking suspicious.

Defendant now argues that the identification procedure used was unduly suggestive in that the relative heights of the subjects were readily determinable by reference to the strategically placed doorframe visible in each photograph. Defendant then argues that under the U.S. Supreme Court decision in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and our decision in *State v. Sanchell*, 191 Neb. 505, 216 N.W.2d 504 (1974), this allegedly unduly suggestive procedure, coupled with the subsequent in-court identification made by Monica Zimmerman, abridged defendant's right to due process under both the U.S. and Nebraska Constitutions. We believe that the contention is without merit.

In *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), the U.S. Supreme Court addressed the issue of a photographic lineup. Approving the use of photographs, the Court said at 384:

> [W]e hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

Following its decision in *Simmons v. United States, supra*, the U.S. Supreme Court decided *Neil v. Biggers, supra*. *Neil* involved an eyewitness identification at trial following a police station showup of the defendant. After discussing its past due process cases, the U.S. Supreme Court determined that unnecessary suggestiveness alone does not require an exclusion

of identification evidence. The Court noted that the showup could have been better conducted but found that the "central question" was "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Neil, supra* at 199. The Court then stated at 199-200:

> As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

An examination of the photographs in this case fails to support defendant's contention that the presence of the doorframe was unduly suggestive and caused Monica Zimmerman to select defendant. In the first instance many courts have held that a suspect's distinctive appearance in a photographic display does not necessarily render the procedure suggestive. See, *United States v. Mefford*, 658 F.2d 588 (8th Cir. 1981) (suspect was the only man in the lineup who was within age range previously described by witnesses); *United States v. Smith*, 602 F.2d 834 (8th Cir. 1979) (suspect wearing blue overalls was only person matching description of robber); *United States v. Bostic*, 360 F. Supp. 1300 (E.D. Pa. 1973), *aff'd mem.* 491 F.2d 751 (3d Cir. 1973) (only suspect's photograph showed scar on forehead). It is impossible from viewing the photographs to determine how far from the wall and doorjamb each subject is standing, and, therefore, one viewing the photographs could not necessarily determine the height of the subject. Furthermore, there was testimony from one of the officers present during the photographic lineup that when Monica Zimmerman viewed the photographs, it took her only "one to two" seconds to eliminate from the array all of the photographs but that of the defendant. The officer's testimony was corroborated by a member of the Nebraska State Patrol who was also present. An examination of the totality of the circumstances makes it abundantly clear that the photographic

array was not unduly suggestive. This assignment of error is therefore overruled.

(6) Right to a Speedy Trial.

Defendant's argument that he was denied a speedy trial under either Nebraska statute or the sixth amendment to the federal Constitution is likewise without merit. The mandate in *Palmer II* was received by the district court on October 28, 1983. Voir dire for the subject trial began on March 5, 1984. In the time between the filing of the mandate and the beginning of the trial, more than 20 motions, the bulk of which went to evidentiary matters, were filed by defendant's attorneys or by defendant himself. Some of these motions were submitted on arguments alone, some were supported by affidavits, and some required full-blown evidentiary hearings. Even without tolling the period on account of defendant's pretrial motions, it is clear that the time required by Neb. Rev. Stat. § 29-1207 (Reissue 1985) had not expired. Section 29-1207(3) provides: "If such defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, such period shall commence to run from the date of the mistrial, order granting a new trial, or the mandate on remand." Trial must then be had within 6 months from that date.

Section 29-1207(4)(a) excludes from the computation of the 6-month period "the time from filing until final disposition of pretrial motions of the defendant . . . ." The subject trial began 17 weeks after the return of the mandate. If one disregards the time during which the pretrial motions were pending, there was only a period of approximately 3 days between the time that the pretrial motions were disposed of and the voir dire of the jury began. To therefore suggest that there was any violation of Nebraska's speedy trial act is wholly frivolous.

Defendant, however, maintains that under the sixth amendment to the U.S. Constitution he was not granted a speedy trial. In so arguing he relies primarily on the U.S. Supreme Court decision in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). In that case the U.S. Supreme Court set out the balancing test it thought was appropriate for the resolution of speedy trial issues under the U.S. Constitution. After noting that the speedy trial right "is

generically different from any of the other rights enshrined in the Constitution for the protection of the accused," *id.* at 519, the Court refused to define the nature of the right by reference to an arbitrary time period as, for instance, the 6-month period set out in § 29-1207. Instead, the Court stated that "[t]he approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Id.* at 530. The Court then set out four factors to be considered in this balancing process: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* Explaining this mechanism, the U.S. Supreme Court expounded on the first factor, saying:

> The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

Id. at 530-31. In our view a delay of 17 weeks from the return of the mandate to a trial does not constitute an unreasonable delay sufficient to cause the other factors to be triggered. We are not, therefore, required to examine any of the factors, finding that a delay of 17 weeks from return of mandate to trial is not unconstitutionally unreasonable. Defendant's assignment regarding lack of a speedy trial is without merit and is overruled.

(7) Motion to Suppress Evidence Obtained From Defendant at the Time of His Arrest in Austin, Texas.

Defendant next challenges the propriety of his arrest in Texas and the seizure of property allegedly stolen from Zimmerman at the time of his death. The evidence presented in the subject trial is identical to that presented in *Palmer I.* That issue was raised in *Palmer I*, and in that regard we said at 212, 313 N.W.2d at 652:

> In the case at bar the evidence establishes, and the defendant does not contest, that the officers had probable cause to arrest the defendant. A valid warrantless arrest was made under the laws of Texas, and the District Court properly overruled the motion to suppress the evidence seized from the person of the defendant at the time of the arrest.

The issue was properly resolved in *Palmer I*, and our holding therein is reapplied in this appeal.

(8) Imposition of the Death Penalty.

Defendant has raised a number of specific subissues with regard to the imposition of the death penalty. They will be considered in the same order in which they are raised.

A. *The overruling of defendant's motion to allow him to secure expert testimony regarding proportionality.*

Defendant maintains that he was entitled to be given sufficient public funds so that he might secure an expert, either at trial or in preparation for an appeal before this court, to produce testimony with respect to the imposition of the death penalty in the State of Nebraska. However, while either a defendant or the State may wish to adduce evidence before the sentencing judge or panel of any case in which the death penalty has been imposed but which has not yet been reviewed by this court, the question of proportionality is not for expert testimony; it is for court determination. See *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982). Thus, defendant's motion was properly overruled.

B. *The overruling of defendant's motion to quash the presentence investigation.*

Defendant maintains that a sentence of death may not be imposed, even in part, on the basis of information contained in a presentence investigation. Like many of the assignments of error raised by defendant, we have previously considered this issue and have rejected it. In *State v. Reeves*, 216 Neb. 206, 221, 344 N.W.2d 433, 444 (1984), we specifically addressed this issue and said: " '[T]he traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.' " Further, in *Reeves, supra* at 223, 344 N.W.2d at

445, we quoted from *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981), saying:

> "We are unable to find any requirement in the law that a sentencing court may consider only information adduced at trial when exercising discretion in imposing sentence. Likewise, we find no constitutional requirement to permit one convicted the right to confront all who might give information to be used by the sentencing court. Such a requirement goes far beyond any constitutional mandate."

See, also, *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984). For these reasons this assignment is overruled.

C. *The overruling of defendant's several objections to the imposition of the death penalty.*

While this assignment of error, as presented, is somewhat vague and does little to assist the court in determining any specific claim of error, defendant, in his brief, makes arguments about several specific factors which will be considered by us to have been included under this assignment of error. While, normally, such an assignment might not be considered by the court because of its vagueness, in view of the severity of the punishment imposed in this case, we address each of the items raised.

(i) *Whether the district court erred in not considering nonstatutory mitigating factors.*

Defendant argues that it has now been firmly established that in a capital case the sentencing authority must not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record, or any of the circumstances of the offense, citing *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), and *Bell v. Ohio*, 438 U.S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 (1978). In *State v. Moore, supra*, this court specifically declared that the defendant could offer, on the issue of mitigation, any evidence, even though the mitigating factor was not specifically listed in the statute.

Defendant argues that the sentencing court did not consider nonstatutory mitigating circumstances concerning his

childhood when imposing the death penalty in this case. A closer examination of both the argument advanced by him and the record makes it clear that defendant's complaint is not that he was not permitted to present the evidence but, rather, that the trial court must have refused to consider the factors, otherwise the court would not have imposed the death penalty in this case. In essence, defendant merely asserts that he is disappointed that the sentencing panel was not persuaded by his evidence. The sentencing panel made specific reference to the evidence regarding his childhood and found that "such evidence does not give rise to a mitigating circumstance." There is nothing in the record to indicate that the court did not consider all of the mitigating evidence offered by defendant, but merely rejected it. The record in this case indicates that defendant's evidence was unconvincing.

(ii) *Whether the statutory aggravating circumstances set out in § 29-2523(1)(d) are unconstitutionally vague.*

This argument has previously been considered by this court and rejected. See, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984); *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977); *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977). It is again rejected in accordance with the later analysis of subissue G of this assignment of error.

(iii) *Whether placing the burden of proof upon defendant to establish mitigating circumstances is in violation of his constitutional rights.*

In effect, defendant argues that, absent proof that one or all mitigating circumstances are not present, the sentencing court must presume that *all* mitigating circumstances exist. Not only does that argument not make any sense on its face, but it has previously been specifically rejected by this court. In *State v. Moore, supra* at 480, 316 N.W.2d at 46, we said:

> The defendant's eighth assignment asserts that the State has the burden of proving beyond a reasonable doubt that no mitigating factor exists. He cites no authority for this proposition. None seems to exist. There is no evidence or claim that the State suppressed any favorable evidence. If there were any mitigating factors other than those shown,

the defendant is in the best position to know and reveal those factors.

The record does not sustain this alleged error.

(iv) *Whether a criminal defendant in a capital case must receive notice of the nature and extent of the aggravating charges to be offered in support of the death penalty.*

Defendant next argues that the district court erred in overruling his motion to require the State to specify upon which aggravating circumstances it intended to rely. In support of that position defendant argues that the sixth amendment to the U.S. Constitution, as well as Neb. Const. art. I, § 11, requires that the accused be informed or have the right to demand "the nature and cause of accusation," citing, further, *May v. State*, 153 Neb. 369, 44 N.W.2d 636 (1950), and *Kissinger v. State*, 123 Neb. 856, 244 N.W. 794 (1932). Defendant is in error in that regard. As we previously noted in both *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981), as well as *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984), and *State v. Reeves, supra*, in the sentencing stage, since it occurs after the question of guilt has been established, the then-convicted defendant is not entitled to all of the same rights accorded one merely accused of a crime but not yet convicted. Furthermore, we note in the instant case that the record clearly establishes that both defendant and his counsel were informed on the record of the aggravating circumstances the State intended to rely upon. There is no merit in this alleged error.

D. *Whether the refusal to permit the jury to consider a lesser-included offense violated defendant's constitutional rights.*

Defendant first acknowledges that neither second degree murder nor manslaughter is a lesser-included offense of the charge of felony murder, citing *Morgan v. State*, 51 Neb. 672, 71 N.W. 788 (1897), *Rhea v. State*, 63 Neb. 461, 88 N.W. 789 (1901), and *Wilson v. State*, 170 Neb. 494, 103 N.W.2d 258 (1960). He then argues, citing, however, no authority for the proposition, that because there is no lesser-included offense for the charge of felony murder, one who commits felony murder may not be sentenced to death. If, as in the present case, there is

no lesser-included offense to the crime charged, a defendant is not entitled to an instruction on a lesser-included offense. The fact, however, that a defendant is not entitled to such an instruction does not eliminate the penalty otherwise provided by statute. For these reasons all of these various miscellaneous objections raised by defendant in this regard are overruled.

E. *Whether the sentence of death must be set aside because it was not imposed, at least in part, by a jury.*

This issue, likewise, has been firmly established to the contrary by this court. In *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), we specifically addressed this issue and rejected the contention that a death penalty could not be imposed absent a jury. In doing so we specifically called attention to the U.S. Supreme Court decision in *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), *reh'g denied* 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158:

> "This [the U.S. Supreme] Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 U.S. 510, 519, n.15, but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

State v. Simants, supra at 558, 250 N.W.2d at 887. We then went on to say at 559, 250 N.W.2d at 888:

> As we understand the federal and state constitutional provisions, they do not require or even suggest that jury sentencing is constitutionally required. Whatever the relative merits of sentencing by a judge or jury may be, we need not consider them. Our concern is the constitutionality of the Nebraska system, under the federal and state Constitutions. The relative merits of the one or the other is for legislative and not judicial determination. We find the sentencing procedure provided by the Nebraska statute does not violate either

the Nebraska or the federal Constitution.

See, also, *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981). This alleged error is overruled.

F. *The overruling of defendant's motion to recuse the members of the sentencing panel.*

While the assignment is raised, there appears to be no argument addressing that specific issue, and we are unable to determine what it is that defendant contends was error. For that reason the alleged error must be overruled.

G. *Whether the sentencing panel properly applied § 29-2523(1)(b) and (d) in sentencing defendant to death.*

After *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), wherein the U.S. Supreme Court held to be violative of U.S. Const. amends. VIII and XIV death sentences imposed under statutes that left juries with untrammeled discretion to impose or withhold the death penalty, the Legislature of Nebraska revised certain statutes pertaining to capital punishment. In 1973 the Legislature enacted the following:

> In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. . . .

§ 29-2521. In 1973 and 1978 the Legislature also enacted:

> After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:
>
> (1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;
>
> (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

> In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

§ 29-2522.

As the aggravating circumstances referred to in §§ 29-2521 and 29-2522, in 1973 the Legislature, in § 29-2523, specified:

> (1) Aggravating Circumstances:
>
> (a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;
>
> (b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;
>
> (c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;
>
> (d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;
>
> (e) At the time the murder was committed, the offender also committed another murder;
>
> (f) The offender knowingly created a great risk of death to at least several persons;
>
> (g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or
>
> (h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

As noted earlier, the sentencing panel found the existence of aggravating circumstances (1)(b) and (d). The evidence establishes that defendant was known to the Zimmermans due to their prior course of dealings. The defendant and his wife had been to the victim's home at least four times prior to the date of the murder. The victim clearly knew and could identify the defendant. The record therefore establishes that

Zimmerman was murdered in an effort to conceal defendant's identity. Thus, the existence of aggravating circumstance (1)(b) has been established beyond a reasonable doubt.

At approximately the time when the Nebraska Legislature was enacting §§ 29-2521 to 29-2523, the Supreme Court of Florida decided *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied* 416 U.S. 943, 94 S. Ct. 1951, 40 L. Ed. 2d 295 (1974). *Dixon* dealt with the aggravating circumstance "especially heinous, atrocious or cruel" found in the Florida statutes. In *Dixon* the court stated at 283 So. 2d at 9:

> The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious or cruel capital felony constitutes an aggravated capital felony. Fla.Stat. § 921.141(6)(h), F.S.A. Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

The U.S. Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), expressed the following:

> Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. . . .
>
> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious

action.

428 U.S. at 188-89.

> While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded "that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case." ALI, Model Penal Code § 201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959) (emphasis in original). While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.

428 U.S. at 193-95.

After noting existence of the Model Penal Code, which refers to aggravating circumstances to warrant imposition of the death penalty and uses the phrase "manifesting exceptional depravity" (now found in Model Penal Code § 210.6(3)(h) (1980)), the Court continued:

> In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

428 U.S. at 195.

Gregg v. Georgia, supra, was followed by *Godfrey v.*

Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). Godfrey's wife and daughter lived with Godfrey's mother-in-law in her trailer. When reconciliation efforts were rebuffed by Godfrey's wife, Godfrey went to the trailer; fired a shotgun through the trailer's window, killing the wife instantly; proceeded into the trailer; and, inside, shot and instantly killed his mother-in-law. On conviction for the murders, Godfrey was sentenced to death by virtue of a statute authorizing capital punishment if evidence beyond a reasonable doubt showed that the murder "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 27-10-30(b)(7) (1982). The U.S. Supreme Court stated:

> In *Furman v. Georgia*, 408 U.S. 238, the Court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. *Gregg v. Georgia, supra*, reaffirmed this holding:
>
> > "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U.S., at 189 (opinion of Stewart, Powell, and Stevens, JJ.).
>
> A capital sentencing scheme must, in short, provide a " 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.' " *Id.*, at 188, quoting *Furman v. Georgia, supra*, at 313 (White, J., concurring).
>
> This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." [Citations omitted.] It must channel the sentencer's discretion by

"clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death." As was made clear in *Gregg*, a death penalty "system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." 428 U.S., at 195, n. 46.

In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible and inhuman." There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman."

446 U.S. at 427-29.

The petitioner's crimes cannot be said to have reflected a consciousness materially more "depraved" than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma. . . . [I]t "is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

That cannot be said here. There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not. Accordingly, the judgment of the Georgia Supreme Court insofar as it leaves standing the petitioner's death sentences is reversed . . . .

446 U.S. at 433.

With the foregoing background regarding the appearance of *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied* 416 U.S. 943, 94 S. Ct. 1951, 40 L. Ed. 2d 295 (1974), *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), and

Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), this court has decided death penalty cases in reference to § 29-2523(1)(d) as an aggravating circumstance, that is, "[t]he murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." We note that the word *or* separates "especially heinous, atrocious, cruel" from "manifested exceptional depravity by ordinary standards of morality and intelligence." Thus, aggravating circumstance (1)(d) of § 29-2523 describes in the disjunctive at least two distinct components of an aggravating circumstance which may relate to a murder and which "may operate in conjunction with or independent of one another." *State v. Moore*, 210 Neb. 457, 470, 316 N.W.2d 33, 41 (1982). See, also, *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554 (1984). The presence of any of the components will sustain a finding that aggravating circumstance (1)(d) exists. See *State v. Correll*, 148 Ariz. 468, 715 P.2d 721 (1986). See, also, *State v. Gretzler*, 135 Ariz. 42, 51, 659 P.2d 1, 10 (1983), *cert. denied* 461 U.S. 971, 103 S. Ct. 2444, 77 L. Ed. 2d 1327 (regarding "heinous, cruel, or depraved," such statutory expression is in the disjunctive, " 'so either all or one could constitute an aggravating circumstance' "). To the extent any of our previous cases such as *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), and *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), contain language which may be read to suggest that the components of aggravating circumstance (1)(d) are in the conjunctive rather than the disjunctive, such language is disapproved.

Among the crimes in which circumstance (1)(d) is frequently found are murders involving " 'torture, sadism, sexual abuse, or the imposition of extreme suffering. . . .' " *State v. Rust*, 197 Neb. 528, 538-39, 250 N.W.2d 867, 874 (1977). See, also, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

There is no arithmetical computation or formula required in a court's consideration of aggravating and mitigating circumstances under § 29-2523. Regarding an aggravating circumstance or a mitigating circumstance, there is no prescribed statutory method by which more or less weight is

assigned to each circumstance indicated in § 29-2523. Where one or more of the aggravating circumstances are established beyond a reasonable doubt concerning a murder, the death penalty may be imposed as a proper sentence unless mitigating circumstances approach or outweigh any aggravating circumstance or circumstances, thereby overriding the effect of such aggravation. See *State v. Dixon, supra*. Existence of an aggravating circumstance under § 29-2523(1) must be proved beyond a reasonable doubt. *State v. Simants,* 197 Neb. 549, 250 N.W.2d 881 (1977); *State v. Rust, supra.*

As a meaning for the words "especially heinous, atrocious, cruel" found in circumstance (1)(d) of § 29-2523, this court, in *State v. Simants, supra* at 566, 250 N.W.2d at 891, has adopted the definition utilized by the Florida court in *State v. Dixon, supra*, that is, especially heinous, atrocious, cruel is "directed to the conscienceless or pitiless crime which is unnecessarily torturous to the victim." See, *State v. Stewart, supra; State v. Moore, supra; State v. Reeves, supra*. See, also, *State v. Hunt, supra*.

"Torture may be found where the victim is subjected to serious physical, sexual, or psychological abuse before death." *Phillips v. State*, 250 Ga. 336, 340, 297 S.E.2d 217, 221 (1982). "A victim's uncertainty as to the ultimate fate can be significant in indicating mental suffering." *State v. Correll, supra* at 480, 715 P.2d at 733.

As did the U.S. Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), we note the existence of Model Penal Code § 210.6(3)(h) (1980), which is an aggravating circumstance for imposition of the death penalty and contains the phrase "manifesting exceptional depravity." In applying the "exceptional depravity" component of § 29-2523(1)(d), we have interpreted and construed that phrase to mean "totally and senselessly bereft of any regard for human life." *State v. Stewart, supra* at 523, 250 N.W.2d at 864; *State v. Rust, supra; State v. Holtan, supra; State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981); *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982).

In reviewing death penalty cases this court has determined

that "exceptional depravity," or an act "totally and senselessly bereft of any regard for human life," existed in several cases. Some of those cases are now set forth for illustrative purposes.

State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977): While robbing a bar, Holtan "herded" the bartender (Loder), the bartender's friend (Ulshafer), and bar patron (Christensen) into a restroom, where Holtan ordered Loder to tie the other two and, while the three victims were lying on the floor, then fired four shots, two striking and killing Loder, one wounding Ulshafer, and the fourth missing any victim. This court stated: "The defendant killed, and attempted to kill, unresisting victims of the robbery. The act was totally and senselessly bereft of any regard for human life." *Id.* at 547, 250 N.W.2d at 880.

State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977): Simants sexually abused three female victims, including first degree sexual assault on a 10-year-old female and sexual penetration of the child's corpse after Simants had shot and killed the child; sexual molestation of a 7-year-old female; and sexual molestation of the grandmother of the 10-year-old victim and a sexual "attack on her body after her death." *Id.* at 566, 250 N.W.2d at 891. The victims' deaths were caused by gunshot wounds inflicted by Simants. This court stated: "The use of the word 'exceptional,' however, confines it only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence." *Id.* This court then determined that depravity was present in the murder of the three females, because (1) "[t]he sexual assault [on the 10-year-old] caused pain, and when the young girl cried out she was killed and there was a further sexual assault upon her after death"; (2) there were "bruises displayed on the inside of [the 7-year-old child's] thighs"; and (3) concerning the victim-grandmother, there was "the difference in the ages of the defendant and the victim, coupled with the attack on her body after her death." *Id.* at 565-66, 250 N.W.2d at 891.

State v. Peery, 199 Neb. 656, 261 N.W.2d 95 (1977): With a rope Peery tied his victim's feet and hands at the wrist behind the victim's back. The victim was gagged and offered no resistance ("totally helpless"). *Id.* at 675, 261 N.W.2d at 105. Peery inflicted three gunshot wounds on the victim, one

between the victim's eyes, one at the right temple of the victim, and the third inflicted while the firearm was thrust into the victim's mouth so that the bullet pierced the roof of the mouth and entered the victim's brain.

State v. Otey, 205 Neb. 90, 287 N.W.2d 36 (1979): Otey told the victim he was going to rob and rape her. When the victim tried to resist, Otey slashed the victim's forehead with a knife and then sexually assaulted the victim. After the sexual assault Otey took the victim to another part of a building where Otey sought the victim's money and inflicted several deep knife wounds on the victim, hit her in the head with a hammer, and, finally, strangled the victim.

State v. Harper, 208 Neb. 568, 304 N.W.2d 663 (1981): When his girlfriend declined to marry him and married another, Harper tested a carcinogen, dimethylnitrosamine, on his parents' pets. Dimethylnitrosamine induces cancer and disrupts blood clotting. After the pets had died as a result of the dimethylnitrosamine, Harper entered his ex-girlfriend's residence and put the dimethylnitrosamine in beverages later ingested by his girlfriend's husband and an 11-month-old child, causing the deaths of the two victims. This court, after noting that each victim had "died a slow and agonizing death" and experienced "extreme suffering" as a result of the dimethylnitrosamine, stated: "[T]he murders of [the two victims] were so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life." *Id.* at 576, 304 N.W.2d at 668.

State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982): Moore devised a plan to rob Omaha cabdrivers. From a telephone booth in downtown Omaha, Moore called a cab and waited to see how quickly the cabdriver responded to that call. If the responding cabdriver was suitable for Moore's plan, that is, "an older man" rather than a young man, Moore planned to shoot the cabdriver and take the driver's money. Pursuant to his plan, Moore shot and killed one cabdriver on August 22, 1979, and another on August 26, 1979. This court held at 471, 316 N.W.2d at 41:

> We agree that the following circumstances exhibit a state of mind exceptionally depraved and totally and senselessly

> bereft of regard for human life: (1) The murders here were coldly planned as a part of the robberies. (2) The evidence clearly supports the conclusion that the murders were to be repetitive, i.e., the defendant intended to continue on his selected course of conduct so long as his needs required. (3) The victims were selected on the basis of certain characteristics which made it easier for the defendant to shoot them, namely, their ages. His unstated conclusion was that a human life in the middle years is less valuable than a younger life.

State v. Reeves, 216 Neb. 206, 344 N.W.2d 433 (1984): After a struggle with the victim and during the course of a first degree sexual assault, Reeves stabbed his victim seven times in her chest. The cuts on the victim's hands "showed that she tried to defend herself from the defendant's brutal attack." Before dying, the victim experienced "extreme suffering." *Id.* at 227, 344 N.W.2d at 447.

The foregoing Nebraska death penalty cases involving the "exceptional depravity" component of aggravating circumstance (1)(d) are clear-cut, specific examples which demonstrate the meaning of the phrase "exceptional depravity." Other courts have held that "depraved" means "marked by debasement, corruption, perversion or deterioration." *State v. Gretzler*, 135 Ariz. 42, 51, 659 P.2d 1, 10 (1983), *cert. denied* 461 U.S. 971, 103 S. Ct. 2444, 77 L. Ed. 2d 1327. See, also, *State v. Morehouse*, 120 N.H. 738, 424 A.2d 798 (1980). Therefore, the finding concerning this component of aggravating circumstance (1)(d) must be not only that the murderer manifested depravity but that the murderer manifested "exceptional depravity." The word "exceptional" sets the defendant's act apart from the usual or norm of first degree murder cases and requires "a consciousness materially more 'depraved' than that of any person guilty of murder." *Godfrey v. Georgia*, 446 U.S. 420, 433, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). In this manner "exceptional depravity" is not a catchall phrase or provision for imposition of the death penalty in first degree murder cases where none of the aggravating circumstances otherwise apply to the murder under examination.

The phrase "exceptional depravity" in § 29-2523(1)(d) refers and pertains to "the state of mind of the actor." *State v. Moore, supra* at 470, 316 N.W.2d at 41. See, also, *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670 (1985). Depravity, as a murderer's state of mind, may be proved by or inferred from the defendant's conduct at or near the time of the offense. See, *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977); *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977); *State v. Martinez-Villareal, supra.*

The Supreme Court of Missouri made the following observation in *State v. Preston*, 673 S.W.2d 1, 11 (Mo. 1984), *cert. denied* 469 U.S. 893, 105 S. Ct. 269, 83 L. Ed. 2d 205:

> In following the mandate of *Godfrey* to establish "clear and objective standards" as to what types of murders constitute "depravity of mind," this Court, while not expressly adopting a precise definition, has noted the following factors to be considered in finding "depravity of mind": mental state of defendant, infliction of physical or psychological torture upon the victim as when victim has a substantial period of time before death to anticipate and reflect upon it; brutality of defendant's conduct; mutilation of the body after death; absence of any substantive motive; absence of defendant's remorse and the nature of the crime. [Citations omitted.]

In *State v. Gretzler, supra*, the Supreme Court of Arizona provided a list of specific factors which may lead to a finding of depravity, namely, (1) the apparent relishing of the murder by the killer, (2) the infliction of gratuitous violence on the victim, (3) the needless mutilation of the victim, (4) the senselessness of the crime, and (5) the helplessness of the victim. See, also, *State v. Wallace*, 151 Ariz. 362, 728 P.2d 232 (1986).

By use of objective factors, such as those suggested by the Supreme Court of Arizona in *State v. Gretzler, supra*, there is a "principled way to distinguish" a death penalty case from those cases where the death penalty is not imposed, see *Godfrey v. Georgia*, 446 U.S. at 433, and, in the imposition of the death penalty, to control discretion " 'by clear and objective standards so as to produce non-discriminatory application,' "

Gregg v. Georgia, 428 U.S. 153, 198, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Therefore, for the purpose of § 29-2523(1)(d) as an aggravating circumstance in determining whether the death penalty may be imposed, we hold that "exceptional depravity" in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim. As we have previously mentioned in reference to "heinous, atrocious, cruel" and "exceptional depravity" as disjunctive components of the aggravating circumstance at § 29-2523(1)(d), the five factors which will support a finding of "exceptional depravity" are also stated in the disjunctive. Consequently, where one or more of those five factors are present, there may be a finding of "exceptional depravity" concerning a first degree murder. Further, we observe that one or more of those five factors or circumstances, listed above, were present in those cases where "exceptional depravity" was found to exist as an aggravating circumstance in the illustrative Nebraska cases involving "exceptional depravity," which we have previously mentioned in this opinion, namely, *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977), *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979), *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981), *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), and *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

Thus, both the phrase "especially heinous, atrocious, cruel" and the phrase "manifested exceptional depravity by ordinary standards of morality and intelligence" provide objective standards in imposing the death penalty, and neither phrase is unconstitutionally vague. Cf. *State v. Simants, supra*.

We emphasize that we do not state, nor do we imply, that "exceptional depravity" may not exist independent of "especially heinous, atrocious, cruel," although existence of a

murder which is "especially heinous, atrocious, cruel" may well establish "exceptional depravity," such as a murderer's relishing the victim's murder or infliction of gratuitous violence. See, *State v. Cooper*, 718 S.W.2d 256 (Tenn. 1986); *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983); *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980).

The sentencing panel did not find Zimmerman's murder to be "especially heinous, atrocious, cruel," although the evidence would have supported such a finding beyond a reasonable doubt. The facts of this case show that the murder of Zimmerman was a "conscienceless or pitiless crime" which was unnecessarily torturous to the victim. Defendant physically abused Zimmerman by beating him, causing bruises, cuts, and scratches. Zimmerman's physical and mental pain are shown by the testimony of Cherie Palmer and found in the appreciable period of time endured by Zimmerman while he awaited his death at defendant's hands. Zimmerman's stress and fear very likely grew to immense proportions as he lay bound and helpless before the murder.

The murder of Zimmerman also "manifested exceptional depravity" on the part of defendant. With Zimmerman bound and helpless on the bed, there was no obstacle to defendant's absconding with Zimmerman's property. Defendant's physical abuse of Zimmerman, who was bound on the bed, was unnecessary to complete the robbery. In murdering Zimmerman defendant inflicted gratuitous violence upon a helpless victim.

The record establishes beyond a reasonable doubt that Zimmerman's murder "manifested exceptional depravity" and that aggravating circumstance (1)(d) exists beyond a reasonable doubt.

Section 29-2523 also specifies seven mitigating circumstances as required by § 29-2522.

Section 29-2523(2)(a) states: "The offender has no significant history of prior criminal activity." The defendant's prior convictions include a 1959 conviction for breaking and entering, a 1970 conviction for two violations of the Mann Act, a 1974 conviction for buying, receiving, or aiding the concealment of stolen property, and a 1975 conviction for

interstate transportation of forged and altered securities. In view of the defendant's significant history of criminal activity, this mitigating circumstance does not exist.

The defendant was not under unusual pressure, influence, or under the domination of another person. Therefore, the record does not establish the existence of the mitigating circumstance set out under § 29-2523(2)(b).

Section 29-2523(2)(c) provides: "The crime was committed while the offender was under the influence of extreme mental or emotional disturbance." The record does not support the existence of this mitigating circumstance.

At the time of the crime the defendant was 40 years old. The mitigating circumstance set out under § 29-2523(2)(d), which provides for the mitigating factor of youth or extreme age, does not exist.

Mitigating circumstance (2)(e) exists when the offender was an accomplice in the crime committed by another and the offender's participation was relatively minor. Mitigating circumstance (2)(f) exists when the victim was a participant in the defendant's conduct or consented to the act. The record establishes that defendant alone did the killing and did not act as an accomplice whose participation was relatively minor. Neither does the record establish that Zimmerman either participated in or in any way consented to any act. Therefore, there is nothing in the record which would support a finding that either mitigating circumstance (2)(e) or (2)(f) exists.

Finally, the issue of the defendant's capacity to appreciate the wrongfulness of his actions or his ability to conform his conduct to the law has not been questioned. Therefore, the mitigating circumstance of mental illness, mental defect, or intoxication at the time of the murder does not exist as provided for under § 29-2523(2)(g).

The record reveals no other mitigating circumstances.

H. *Proportionality of the death penalty.*

Finally, the defendant argues that the sentence of death in this case is erroneous because it is "greater than those imposed in other cases with the same or similar circumstances," and therefore is disproportionate in violation of § 29-2521.03.

Sections 29-2521.01, 29-2521.02, and 29-2521.03 provide

that this court shall review and analyze all cases involving *criminal homicide* committed on or after April 20, 1973, and determine the propriety of the sentence in each case involving a criminal homicide "by comparing such case with previous cases involving the same or similar circumstances." The expressed purpose is to ensure that the death penalty should be applied uniformly and not arbitrarily.

It is apparent that the statutes cannot be enforced as they were written. The term *homicide* includes all crimes involving "the killing of a person by another." Neb. Rev. Stat. § 28-302(1) (Reissue 1985). A death sentence may be imposed only in cases involving a Class I felony. Neb. Rev. Stat. § 28-105(1) (Reissue 1985).

In *State v. Williams*, 205 Neb. 56, 76, 287 N.W.2d 18, 29 (1979), we noted that to interpret the language of the statute literally "would create insurmountable constitutional problems." We further noted that cases construing a similar Georgia statute reflected the obvious fact that it was a practical impossibility to make a meaningful comparison of a death sentence in a first degree murder case with a sentence imposed for another crime for which the death sentence was not authorized.

In the *Williams* case we construed the word "sentence" in § 29-2521.03 to mean a sentence of death and that the provisions requiring a comparison with previous cases were applicable only to cases in which a sentence of death had been imposed. Finally, we concluded in the *Williams* case that the sentence imposed was not excessive or "disproportionate to the death penalties imposed in the other death penalty cases." 205 Neb. at 77, 287 N.W.2d at 29-30.

In *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), we delineated some of the reasons why a literal application of the statute would unconstitutionally encroach upon the judicial function. In the *Moore* case we stated at 473-76, 316 N.W.2d at 42-44:

> Neb. Const. art II, § 1, provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these

departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." A similar division of powers, under the U.S. Constitution, is held to exist by implication. Corwin's The Constitution and What It Means Today at 6-7, 204 (14th ed. H. Chase & C. Ducat 1978); *Hampton & Co. v. United States*, 276 U.S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1928); *Hayburn's Case*, 2 Dall. 409, 2 U.S. 409, 1 L. Ed. 436 (1792).

The separation of powers doctrine imposes restrictions upon the legislative branch to limit the judicial functions of the courts. The Legislature cannot, by subsequent legislation, divest rights which have vested by virtue of a judgment. *City of Wayne v. Adams*, 156 Neb. 297, 56 N.W.2d 117 (1952). It cannot enact legislation to retroactively open or vacate a judgment. *Mooney v. Drainage District, on rehearing* 134 Neb. 192, 278 N.W. 368 (1938), *cert. denied* 305 U.S. 622, 59 S. Ct. 84, 83 L. Ed. 398 (1938). The limits of the jurisdiction conferred upon the Supreme Court by the Constitution may not be increased or extended by legislative enactment. *State ex rel. Wright v. Barney*, 133 Neb. 676, 276 N.W. 676 (1937); *Miller v. Wheeler*, 33 Neb. 765, 51 N.W. 137 (1892); *State v. Hall*, 47 Neb. 579, 66 N.W. 642 (1896). It cannot change procedures established by the Constitution. *State ex rel. v. Ellis*, 156 Or. 83, 66 P.2d 995 (1937). It cannot interfere with the judicial function of adjudicating the fact of an acquittal. *In re Johnston*, 3 Cal. 2d 32, 43 P.2d 541 (1935). It may not reverse a judgment. *Roberts v. The State*, 160 N.Y. 217, 54 N.E. 678 (1899). It may not direct the disposition of a case in which jurisdiction has attached. *State v. Costen*, 141 Tenn. 539, 213 S.W. 910 (1919). *It is to be clearly implied from the foregoing principles that the Legislature cannot direct the disposition of one case by the factual determinations in another.*

It is apparent from the language of § 29-2521.01(5) and § 29-2521.02 that the Legislature attempts to impose a mandate upon this court to look behind prosecutorial judgments concerning the charges to be filed, jury verdicts

determining the particular degree of homicide, and then, based upon our independent findings of the facts in those adjudicated cases, to determine the penalty in the case before us.

We must examine the constitutional import of the foregoing legislative purpose. In examining prosecutorial discretion we would of necessity have to independently gather evidence. The gathering of evidence is not a judicial function but one of the executive. We would then determine what charges we think should have been filed. Again, this is an executive function of the prosecutor. We would make a judgment about the chances of a conviction as against an acquittal, again an executive function. We would need to weigh the advisability of a plea bargain to secure a conviction on a lesser charge in order to avoid a likely acquittal of all charges. These are all clearly executive and not judicial functions.

It must be borne in mind that not all homicide convictions result in appeals to this court. The following illustrates the Legislature's intrusion into the judicial function under L.B. 711. If a person is charged with murder in the first degree but convicted of a lesser degree of homicide, and if L.B. 711 is to be applied literally, we would then, for purposes of reviewing the case before us, disregard the factfindings of the jury in the so-called "analogous" case. Such a procedure would be constitutionally objectionable for a number of reasons. First, it would require this court to find facts in a case not before it. Secondly, it would constitute an attempt by the Legislature to make the factfindings of one case determinative of the sentence in another case on review. It is plain that under the principles we have earlier cited, that legislation which attempts to achieve such results is an intrusion on the judicial function, contrary to the separation of powers doctrine, and thus violates article II, § 1.

Another effect of L.B. 711 would be to unconstitutionally restrict the appellate review powers of this court under Neb. Const. art. I, § 23, as that

> legislation attempts to bind this court by requiring it to apply sentences imposed in some "analogous" case in a district court. It is clear that applying such a standard would restrict a defendant's right to an independent review by this court under article I, § 23, of the Bill of Rights of our Nebraska Constitution. This section provides: "In all cases of felony the defendant shall have the right of appeal to the Supreme Court; and in capital cases such appeal shall operate as a supersedeas to stay the execution of the sentence of death, until further order of the Supreme Court."
>
> Upon this closer review of L.B. 711, it is clear the Legislature in that act attempts to exercise the judicial function in violation of the Constitution. Sections 2 and 3 of L.B. 711 must be restricted in their application to a comparison in this court of only those cases in which the defendant in the District Court has been convicted of murder in the first degree.

(Emphasis supplied.)

In his brief the defendant cites a number of cases in which a sentence to life imprisonment was imposed. He then argues that the cited cases involved the same or similar circumstances as this case and that the sentence imposed in this case is, therefore, excessive and disproportionate.

One of the cases cited by the defendant is *State v. Floyd*, a Hamilton County, Nebraska, case in which no appeal was taken to this court. In *State v. Moore*, 210 Neb. 457, 477, 316 N.W.2d 33, 44 (1982), in reference to an exhibit relating to the *Floyd* case, we said: "Although not specifically argued, it clearly appears the apparent purpose of introducing the exhibit was to raise the issue of whether an isolated case in which the death penalty perhaps should have been imposed, but was not, becomes the standard which governs all capital cases before this court." We rejected the argument, largely upon the basis that it was impossible to tell from the limited record before us whether Floyd should have been sentenced to death. However, we concluded also that an isolated case should not be the standard by which all other sentences must be judged.

Evenhandedness in sentencing is a goal for which all courts

strive. We do not perceive, however, that it was the purpose of the Legislature to eliminate all discretion in sentencing and ensure that the death penalty be imposed in every case in which it is a possible sentence or that the penalty not be imposed in cases in which it is appropriate because in certain other cases it was not imposed, although it might have been an appropriate sentence. We think the dominant purpose of the statute is best expressed by the provision in § 29-2521.03 that "[n]o sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances."

It would be possible to construe the statute so that cases in which the death penalty was not imposed, although upon reflection it could be said that the death penalty might have been imposed, would be the standard against which all future death penalty cases would be compared. By a process of "attrition" this would result in a substantial narrowing of the group of cases in which the death penalty would be a possible sentence and, eventually, for all practical purposes, could amount to a repeal of the death penalty. We do not understand that the Legislature intended the statute to effect a repeal of the death penalty. We take judicial notice of the fact that the Legislature has considered bills to repeal the death penalty many times in recent years, but a repeal has never become law. Most recently, a legislative bill for that purpose (L.B. 70, 89th Leg., 1st Sess.) was indefinitely postponed by the Legislature's adjournment on April 16, 1986.

Whatever cases are examined, the final act of review which this court must perform is to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." § 29-2522(3). In order for this court to perform that function, that section also requires that when the trial court imposes the death sentence, the determination must be in writing with reference to the aggravating and mitigating circumstances involved. There is no similar requirement when the sentence is life imprisonment.

Accordingly, there is no way of this court's knowing whether any aggravating or mitigating circumstances were present in a given case unless the sentence was death. Therefore, no other

case but a death sentence case can be said to be a case similar to that under review.

In *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984), the U.S. Supreme Court held that the U.S. Constitution does not require a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases, although requested to do so by the prisoner. In death cases the proportionality requirements of the U.S. Constitution are satisfied by the procedure for identifying aggravating and mitigating circumstances and meaningful appellate review.

In *Pulley* the Court stated at 54:

> *Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in Furman. As we have acknowledged in the past, "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.' " Zant v. Stephens*, 462 U.S., at 884, quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion).

(Emphasis supplied.)

In *Gregg v. Georgia*, 428 U.S. 153, 199, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), the Court stated: "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."

In some of our prior decisions we have indicated that the proportionality review in all death penalty cases is a comparison of the facts and circumstances in all first degree murder cases, whether the penalty imposed was death or life imprisonment. Upon further consideration of this question we have concluded that the review should include only those cases in which the death penalty was imposed. Since there is an automatic appellate review in all such cases, we have before us records upon which we can rely in making the analysis and comparison.

An important distinguishing factor that is present in all death penalty cases is an adjudication that there are one or more aggravating circumstances which are not outweighed by any

mitigating circumstances. Although the existence of an aggravating circumstance does not ensure that the death penalty will be imposed, the absence of an adjudication that at least one aggravating circumstance exists prevents the death penalty from being imposed.

The Supreme Court of South Carolina has determined that the proportionality review which it makes in death cases under a similar statute should be limited to other cases in which the death penalty was imposed. In *State v. Copeland*, 278 S.C. 572, 586-87, 300 S.E.2d 63, 71-72 (1982), *cert. denied* 460 U.S. 1103, 103 S. Ct. 1802, 76 L. Ed. 2d 367 (1983), that court stated:

> Appellant Copeland attacks the constitutionality of the South Carolina death penalty regime on the basis of this Court's interpretation of § 16-3-25(C) of the Code. . . .
>
> The General Assembly of South Carolina has clearly made the policy determination that proportionality review by this Court shall be accorded capital defendants who actually receive a sentence of death. The language of § 16-3-25(C) puts three questions before this Court for review in a given case:
>
> 1. Whether sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> 2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 16-3-20, and
>
> 3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> It is the third inquiry which constitutes proportionality review in South Carolina. Under the statute, the task of defining "similar cases" and with it the scope of any comparative analysis is plainly and properly left to this Court. As indicated below, both the statutory language and the nature of the task give rise to perplexity. There is, after all, some logic to the view that the heinous crime is *sui generis*, simply beyond comparison.

Then, after discussing the absence of any federal constitutional requirement of a proportionality review, the

court stated at 590-91, 300 S.E.2d at 74:

> We conclude from the foregoing that the contours of proportionality review, where it exists, have been left to state determination since the U.S. Supreme Court has declined to impose any specific model of review upon the states. § 16-3-25(C) of the Code represents an act of legislative grace by the General Assembly which we are required to interpret in accordance with sound rules of statutory construction.
>
> In our view, the search for "similar cases" can only begin with an actual conviction and sentence of death rendered by a trier of fact in accordance with § 16-3-20 of the Code. We consider such findings by the trial court to be a threshold requirement for comparative study and indeed the only foundation of "similarity" consonant with our role as an appellate court.
>
> We recognize that in some jurisdictions and commentaries it is felt that the reviewing court should compare a given death sentence with a "universe" of cases which includes sentences of life imprisonment, acquittals, reversals and even mere indictments and arrests. Under such a regime, the reviewing court could only determine the size of its sample or "universe" by some arbitrary device. Fact findings of the trial court, by contrast, provide a fundamental line of demarcation well recognized in and even exalted by our legal tradition. The decisive importance of such findings is evidenced by the language of Article V, section 5, South Carolina Constitution, which limits our review to "correction of errors at law" in all but equity cases.
>
> To expand the notion of a "universe" would also entail intolerable speculation by this Court. Under the South Carolina statute, a jury is not required to state its reasons for failing to recommend a sentence of death. In a given case, the alleged aggravating circumstance may not have been proven to the satisfaction of the jury, while in another "similar case" (expansively defined) the statutory mitigating circumstances or some mitigating factor "otherwise authorized or allowed by law" may have

> deterred imposition of the death sentence.
>
> This Court would enter a realm of pure conjecture if it attempted to compare and contrast such verdicts with an actual sentence of death. They represent acts of mercy which have not yet been held to offend the United States Constitution. Moreover, they reflect the emphasis upon individualized sentencing mandated by the United States Supreme Court. We will not subject these verdicts to scrutiny in pursuit of phantom "similar cases," when a meaningful sample lies ready at hand in those cases where the jury has spoken unequivocally.

Similarly, in *State v. Nash*, 143 Ariz. 392, 694 P.2d 222 (1985), the Arizona Supreme Court limited its proportionality review to cases in which the death penalty had been imposed and the sentence affirmed or reduced.

It must be recognized that no two death cases are the same. The facts vary greatly from case to case, and the cases cannot be "color-matched." The comparison of the facts in any death case with the facts in previous cases in which the death penalty has been imposed can at best be general in nature.

From our review of the record in this case, and the review of the records in all cases in which the death sentence was imposed for offenses committed on or after April 20, 1973, we have concluded that the penalty imposed in this case is neither excessive nor disproportionate to the penalty imposed in the earlier cases, considering both the crime and the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., concurring.

This court has struggled to apply the provisions of Neb. Rev. Stat. §§ 29-2521.01 et seq. (Reissue 1985) since their passage. The difficulties, both constitutional and semantic, have been extreme, as is well pointed out in the majority opinion. I agree that to compare a case in which there is a finding of guilt of first degree murder with a conviction of a lesser homicide is not only difficult, it is impossible. Any case where the requisites of either felony murder or intentional, premeditated murder have not been found is as different as night to day from a case where such requisites are judicially determined, if for no other reason than

the fact of judicial determination of the requisite facts in one case and not the other.

We must adhere to our role as an appellate court. The findings of fact by a jury or a judge in a jury waived case or on the acceptance of a plea are binding on us. We do not have the authority to determine that the crime was of a higher degree. We may not, in a matter so vital as the imposition or nonimposition of the death penalty, speculate as to decisions of the executive branch in not seeking conviction of a higher degree of homicide, nor by our decision question the factual determination of the fact finder.

I do not, however, agree that the only reasonable or possible application of § 29-2521.01 is to limit the comparison to cases in which the death penalty has been imposed. The penalty for first degree murder is either life imprisonment or death. That sentence decision is considered in all convictions for first degree murder. It seems to me that the rejection of a sentence of death by the judge or panel of judges is as important to proportionality as the imposition of such a penalty. The task of comparison, though difficult, is neither impossible nor constitutionally prohibited, and, therefore, we are commanded to make that comparison. I state further, however, that comparing all first degree murder cases with the subject case, the sentence is not disproportionate. I therefore concur in the result.

SHANAHAN, J., joins in this concurrence.

KRIVOSHA, C.J., concurring in part, and in part dissenting.

I concur in the opinion as adopted by the majority insofar as it concludes that no error was committed in finding Palmer guilty of first degree murder. I am unable to agree in all respects with the majority's analysis of the penalty and must therefore concur in part and in part dissent.

In reaching that decision I am quick to acknowledge that the law is an art and not an exact science, and therefore honest disagreements may exist even among members of a court.

I further wish to point out, before undertaking an analysis of our differences, that my conclusions are not in any manner affected by personal views but, rather, are controlled by honest

disagreements as to the meaning of the law as adopted by the Legislature of the State of Nebraska. What I may think about the law is totally irrelevant to the decision, and the decision may not reflect my personal views. All that matters is what I think the law thinks about the matter. In that respect the majority and I may honestly disagree without either injecting our personal views in the making of our respective decisions.

Obviously, I am not, nor could I as a matter of law be, opposed to the death penalty. See *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981), and *State v. Joubert, post* p. 411, 399 N.W.2d 237 (1986), cases in which I either wrote the majority opinion for the court or concurred in the opinion of the majority in upholding the imposition of the death penalty. Furthermore, even in those cases in which I have dissented on the basis that I do not believe the penalty was imposed in accordance with Nebraska statutes, I have voted with the majority in subsequent postconviction cases when the issues presented to us involved legal questions other than whether the death penalty had been imposed in accordance with the law as enacted by the Legislature. See, *State v. Holtan*, 216 Neb. 594, 344 N.W.2d 661 (1984); *State v. Harper*, 214 Neb. 911, 336 N.W.2d 597 (1983); *State v. Otey*, 212 Neb. 103, 321 N.W.2d 453 (1982); *State v. Peery*, 208 Neb. 639, 305 N.W.2d 354 (1981).

My disagreement with the majority in this case is a disagreement over the meaning of the law and does not involve questions of ethics or morality. As I have earlier stated in my dissent in *State v. Williams*, 205 Neb. 56, 79-80, 287 N.W.2d 18, 31 (1979):

> I totally reject the contention made by some that the imposition of the death penalty is either immoral or unethical when imposed by a society pursuant to its criminal code and subject to the further requirement that the defendant be afforded due process of law. We find the imposition of capital punishment in an appropriate case provided for as early as the Mosaic Code and perhaps even before. I have difficulty concluding that that which is embodied in the Mosaic Code can be either unethical or

immoral.

> It is true that some societies, through the ages, have discriminated in the manner in which capital punishment has been administered or have imposed it in a barbaric manner. Neither of those actions can be condoned. But the mere fact that a society prescribes the imposition of the death penalty in an appropriate case does not cause it to be either immoral or unethical.

I therefore do not believe that the death penalty itself violates the eighth amendment to the U.S. Constitution. I do, however, believe that the majority in this case is in error in its interpretation of certain provisions of Neb. Rev. Stat. §§ 29-2523 and 29-2521.02 to 29-2521.04 (Reissue 1985). I shall now attempt to point out wherein I believe the majority is in error.

The majority has concluded that the provisions of § 29-2523(1)(d) contain two separate prongs which are disjunctive. The first prong, according to the majority, is that the murder was "especially heinous, atrocious, cruel," while the second prong is that the murder "manifested exceptional depravity by ordinary standards of morality and intelligence." This language is not language created by the court; rather, it is the language of the statute as adopted by the Legislature in § 29-2523(1)(d).

Then, in an effort to avoid an attack that the second prong is invalid because it is too vague, the majority has very properly attempted to refine the meaning of the second prong by setting out five factors, any one of which it says may be sufficient to establish the second prong of (1)(d). It is here where I have difficulty. It appears to me that the majority has defined the second prong of (1)(d) either in terms of the first prong or in terms which I believe are no more precise than the statutory words of the second prong itself.

As I have already indicated, I have no quarrel with the majority in attempting to redefine the second prong of (1)(d) in order to give it certainty. The Legislature, having failed to sufficiently define either the first prong or the second prong of (1)(d) with constitutional sufficiency, has left the court with no other choice.

As noted by the majority, the U.S. Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 188-89, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), held in part:

> Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. . . .
>
> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

The majority in this case then further observes that thereafter the U.S. Supreme Court held in *Godfrey v. Georgia*, 446 U.S. 420, 427-28, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980):

> A capital sentencing scheme must, in short, provide a " 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.' " *Id.*, at 188, quoting *Furman v. Georgia, supra*, at 313 (White, J., concurring).
>
> This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." [Citations omitted.] It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death." As was made clear in *Gregg*, a death penalty "system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." 428 U.S., at 195, n. 46.

The sum and substance of all of this is that in order for a

statute such as § 29-2523(1)(d) to pass constitutional muster, it may not be so vague that it is meaningless or so broad that it may be used in an arbitrary fashion. If reasonable minds can honestly disagree as to its meaning, the statute fails to satisfy its constitutional requirement. That is to say, the standards may be in fact no standard simply because of their language.

I am of the opinion that the majority's effort in defining what it has described as the second prong of (1)(d), though made with the best of intentions, fails to define the act with the requisite clarity or do anything more than redefine the first prong of (1)(d). The second prong of (1)(d) cannot, therefore, standing alone, justify the imposition of the death penalty as prescribed by the Legislature. I shall now attempt to point out where I believe the effort of the majority in that regard fails.

The majority has said that the second prong of (1)(d) may be established if one or more of five factors, either alone or together, are established by the evidence beyond a reasonable doubt. The five factors are: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; and (5) helplessness of the victim.

According to both the U.S. Supreme Court and the majority, the purpose of defining the second prong in definite terms is to provide a " 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.' " *Gregg v. Georgia, supra* at 188.

And as further noted by the majority: "The word 'exceptional' sets the defendant's act apart from the usual or norm of first degree murder cases and requires 'a consciousness materially more "depraved" than that of any person guilty of murder.' " In my view the five factors which the majority now says establish the second prong of (1)(d), which is separate and apart from the first prong of (1)(d), are either too broad to satisfy the requirement that they narrow the cases in which the death penalty may be imposed or are nothing more than a repeat of the definition of the first prong and therefore cannot stand alone.

I turn first to factor (4), the "senselessness of the crime," and factor (5), the "helplessness of the victim." As to factor (4), I am

unable to envision any murder which makes sense. It occurs to me that, at a minimum, nearly all, if not all, murders are senseless, as that term is commonly understood. At best, this factor creates an honest but substantial difference of opinion. Therefore, factor (4) must fail either because it is all-encompassing or because it is too vague. In any event it certainly is not evidence of an "exceptional" act. Even if one can conjure up a few cases in which the murder "makes sense," a fact with which I am unable to agree, the definition of factor (4) will be the norm rather than the exception. The majority, therefore, has read the word "exceptional" out of the act and made the second prong merely evidence of a "depraved mind" rather than an "exceptionally depraved mind." The word "exceptional" is not the court's word but, rather, the Legislature's word.

And, in any event, a factor defined in terms of the "senselessness of the crime" is no more precise than our earlier definition of the second prong of (1)(d) to the effect that the murder manifests "exceptional depravity" if it is "totally and senselessly bereft of any regard for human life." In either case, the words of the second prong, as defined by the majority, are not "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). Nor, in my view, do they provide the sentencer with " 'clear and objective standards' " for " 'specific and detailed guidance' " and " 'make rationally reviewable the process for imposing a sentence of death.' " *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).

In my view factor (5), likewise, offers no better limiting standard than does factor (4). In few, if any, cases will the victim be other than helpless. It is usually this helplessness which, unfortunately, results in the murderer's being able to complete his or her act. What I have set out in some detail regarding factor (4) can be applied to factor (5). In view of the fact that the majority has declared that not only is the second prong of (1)(d) disjunctive from the first but that all five factors are themselves disjunctive, it would appear that the death penalty could be imposed if the evidence established beyond a

reasonable doubt that the "murder was senseless" or that the "victim was helpless." That cannot, in my view, establish an "*exceptionally* depraved mind." I am therefore of the opinion that, on this basis alone, the second prong, as now defined by the majority, is constitutionally invalid.

However, I believe that an examination of the history which led to the adoption of (1)(d), including the creation of a definition for the first prong, convincingly establishes that in fact (1)(d) consists of only one prong and that the phrase "or manifests exceptional depravity" is nothing more than a further explanation of the phrase "especially heinous, atrocious, cruel." In order to make my point on this issue, it is necessary to review some of the history regarding the "especially heinous" phrase.

The Model Penal Code, from which much of our act, and in particular § 29-2523(1)(d), was taken, was somewhat different from what was ultimately enacted by our Legislature. Model Penal Code § 210.6(3)(h) (1980) reads: "The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity." How or why the word "or" between "atrocious" and "cruel" was moved between "cruel" and the second prong is not anywhere explained. But when one considers how we have defined "especially heinous" and how we have defined "exceptionally depraved," it seems to me that factors (1), (2), and (3) define one and the same prong.

In a long line of cases, apparently having its inception in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied* 416 U.S. 943, 94 S. Ct. 1951, 40 L. Ed. 2d 295 (1974), most, if not all, courts which have been given statutes by their legislatures using "especially heinous" as an aggravating factor have held that before the murder may be considered to be "especially heinous" the evidence must establish that it was "conscienceless or pitiless" and "unnecessarily torturous to the victim." *Id.* at 9. That has become the accepted legal meaning of the phrase "especially heinous, atrocious, or cruel."

Furthermore, an examination of just some of the cases makes the definition as set out above even clearer.

In *State v. Goodman*, 298 N.C. 1, 24-25, 257 S.E.2d 569, 585 (1979), the North Carolina court said:

G.S. 15A-2000(e)(9) states that the jury may consider as an aggravating circumstance justifying the imposition of the death penalty the fact that the "capital felony was especially heinous, atrocious, or cruel." While we recognize that every murder is, at least arguably, heinous, atrocious, and cruel, we do not believe that this subsection is intended to apply to every homicide. By using the word "especially" the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection. *State v. Stewart, supra; State v. Rust, supra; State v. Simants*, 197 Neb. 549, 250 N.W. 2d 881, *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed. 2d 158 (1977).

The Florida provision concerning this aggravating factor is identical to ours. Florida's Supreme Court has said that this provision is directed at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950 [sic], 40 L.Ed. 2d 295 (1974); *see also, State v. Alford*, 307 So. 2d 433 (Fla. 1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed. 2d 1221 (1976). Nebraska has also adopted the Florida construction of this subsection. Both Florida and Nebraska have limited the application of this subsection to acts done to the victim during the commission of the capital felony itself. *State v. Rust, supra; Riley v. State*, 366 So. 2d 19 (Fla. 1979). We too believe that this is an appropriate construction of the language of this provision. Under this construction, subsection (e)(9) will not become a "catch all" provision which can always be employed in cases where there is no evidence of other aggravating circumstances.

And in *State v. Monroe*, 397 So. 2d 1258, 1274-75 (La. 1981), the Louisiana Supreme Court, in a murder case, said:

Although the jury found the instant offense to have been committed in an "especially heinous, atrocious or cruel manner," this finding cannot stand. It is true that the murder was brutal—the victim lost over two quarts of

> blood, her lungs were punctured and one of her ribs was severed. Her death was not instantaneous, and she lived long enough to call out for her daughter and reach for the telephone.
>
> Nonetheless, in order for a murder to be "especially heinous," there must exist *evidence* that there was "torture or the pitiless infliction of unnecessary pain on the victim." *State v. English*, 367 So.2d 815, 823 (La.1979). *State v. Clark*, 387 So.2d 1124 (La.1980), provides an example of what is meant by "especially heinous." In that case the defendant stabbed the victim thirty-five times before shooting him with a gun. In the instant case, the "wounds were inflicted to kill, not to maim or to inflict pain." *State v. Culberth*, supra, at 851. While there is some evidence in this case that the offense was heinous and cruel, it was not proved beyond a reasonable doubt that the instant offense was *especially* heinous.

(Emphasis supplied.)

In *Hopkinson v. State*, 632 P.2d 79 (Wyo. 1981), the defendant, tried under a statute nearly identical to the Nebraska statute, argued that a jury could find any murder to be especially heinous, atrocious, or cruel and therefore could conclude that this aggravating circumstance is present in all cases. He contended that it, therefore, gave the jury a free rein to decide to sentence a person to death in every case and, thus, in effect, abolished the requirements previously established by the U.S. Supreme Court for imposing the death penalty. In rejecting that argument the Wyoming court said at 153-54:

> We disagree with appellant's conclusion. The statute does *not* fail to properly channel the jury's sentencing decision and does *not* grant it unfettered discretion to impose the death penalty for arbitrary and capricious reasons. First, the statute requires the jury to find the murder to have been "especially heinous, atrocious or cruel." Webster's Third New International Dictionary defines heinous as "hatefully or shockingly evil." Thus the term "especially heinous" is more than just hatefully or shockingly evil. The murder, to be so classified, must

> demonstrate that the consciencelessness of the defendant is not only an outrage but also a dangerous and unrestrainable threat to society. Only when this is found can the murder properly be categorized as especially heinous. Since very few murders can be regarded in this manner, the term is *not* impermissible and vague.

The view of the Wyoming court is in accord with that of the U.S. Supreme Court. In *Proffitt v. Florida*, 428 U.S. 242, 255, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), *reh'g denied* 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158, Justices Stewart, Powell, and Stevens, in the Court's plurality opinion, said:

> In particular, the petitioner attacks the eighth and third statutory aggravating circumstances, which authorize the death penalty to be imposed if the crime is "especially heinous, atrocious, or cruel," or if "[t]he defendant knowingly created a great risk of death to many persons." §§ 921.141(5)(h), (c) (Supp. 1976-1977). These provisions must be considered as they have been construed by the Supreme Court of Florida.
>
> That court has recognized that while it is arguable "that all killings are atrocious . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." *Tedder v. State*, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

The necessary distinction to be made between what is simply heinous and what is especially heinous is pointed out by the Alabama court in *Berard v. State*, 402 So. 2d 1044 (Ala. Crim. App. 1981), in which the trial court found that the homicides were "brutal" and therefore ordered the imposition of the death penalty. In discussing that matter the Alabama court said at 1050: "That the homicides were 'brutal' fails to conform to § 13-11-6(8) which requires a finding that the crime was '*especially* heinous, atrocious or cruel.' (Emphasis supplied.) The crime was in fact brutal, but the statute requires more."

Later, in the case of *McCray v. State*, 416 So. 2d 804 (Fla.

1982), the Florida Supreme Court again reviewed its statute, nearly identical to Nebraska's, and reversed a sentence of death because it found that the crime was not especially heinous, atrocious, or cruel, as previously defined by the Florida court. The facts of *McCray* indicated that a murder in which the victim died from three bullets to the stomach did not meet the statutory definition.

Similarly, in *Clark v. State*, 443 So. 2d 973, 977 (Fla. 1983), the Florida court again said:

> Directing a pistol shot to the head of the victim does not establish a homicide as especially heinous, atrocious, or cruel. *Kampff v. State*, 371 So.2d 1007 (Fla.1979). Although Mr. Satey testified that he heard his wife moan after being shot, there was no evidence of whether she was conscious after being shot, not [sic] did the medical examiner indicate how long Mrs. Satey survived or what degree of pain, if any, she suffered. Although the helpless anticipation of impending death may serve as the basis for this aggravating factor, there is no evidence to prove that Mrs. Satey knew for more than an instant before she was shot what was about to happen to her. Similarly, as pitiable as were Mr. Satey's vain efforts to dissuade his attackers from harming his wife, it is the effect upon the victim herself that must be considered in determining the existence of this aggravating factor.

The following year, Mississippi, in the case of *Billiot v. State*, 454 So. 2d 445 (Miss. 1984), considered the "especially heinous, atrocious or cruel" provision of its statute, saying at 464:

> [W]hat is intended by the words "especially heinous, atrocious or cruel", "are those capital crimes where the actual commission of the felony was accompanied by such additional facts as to set the crime apart from the norm of capital felonies—*the consciencelessness* [sic] *or pitiless crime which is unnecessarily tortuous* [sic] *to the victim*."

During that same year, Florida, in *Gorham v. State*, 454 So. 2d 556 (Fla. 1984), held that where one shot penetrated the victim's heart, causing death within 10 seconds, and where the evidence disproved any possibility of prolonged and torturous captivity and there was no evidence whatsoever that the victim

apprehended certain death more than moments before he died, the aggravating circumstance in support of the death penalty that the murder was especially heinous, atrocious, and cruel, being based as it was upon the victim's having been thereafter shot twice in the back, could not be sustained.

In doing so the Florida court said in *Gorham, supra* at 559: "While the murder was, of course, a cruel and unjustifiable deed, there is nothing about it to 'set the crime apart from the norm of capital felonies.' " The evidence indicated that the victim was already dead when the next two shots were fired. The Florida court's position was not based upon its notion that the murder was not terrible or even heinous but that, in order for the statute to be constitutional and not permit the imposition of the death penalty in every case, the aggravating circumstance "especially heinous" must be interpreted to be limited to those few cases in which the murder was committed in such a manner as to cause torture to the victim before death in a conscienceless and pitiless way. This distinction is made not because the courts are without sensitivity but, rather, because the death penalty may not be imposed unless clear, rigid standards are first met. See, *Thompson v. State*, 456 So. 2d 444 (Fla. 1984); *Rembert v. State*, 445 So. 2d 337 (Fla. 1984); *State v. Wilson*, 467 So. 2d 503 (La. 1985).

In arriving at its conclusion that the second prong of (1)(d) is disjunctive and consists of five separate factors, the majority has relied upon similar action taken by the Arizona Supreme Court, and, in particular, its decision in *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), *cert. denied* 461 U.S. 971, 103 S. Ct. 2444, 77 L. Ed. 2d 1327, wherein the Arizona Supreme Court set out the five factors now adopted by this court as the definition of the second prong of (1)(d).

As I see it, the difficulty with that analysis is that Arizona appears to make no distinction between "especially heinous" and "especially depraved," as does the majority herein.

To begin with, the Arizona statute is not the same as Nebraska's. Ariz. Rev. Stat. Ann. § 13-703F.6. (Supp. 1986) reads: "The defendant committed the offense in an especially heinous, cruel or depraved manner."

Furthermore, the Arizona Supreme Court uses the five

factors not only to define "depraved" but to define "heinous" as well.

In *State v. Smith*, 146 Ariz. 491, 503, 707 P.2d 289, 301 (1985), the Arizona Supreme Court said:

> "Heinous" and "depraved" are characteristics reflecting the mental state and attitude of the perpetrator of the crime. *State v. Gretzler*, 135 Ariz. at 51, 659 P.2d at 10. In *Gretzler*, we listed several factors which may lead to a finding of *heinousness or depravity*: (1) the apparent relishing of the murder by the killer; (2) the infliction of gratuitous violence on the victim beyond the murderous act itself; (3) the needless mutilation of the victim; (4) the senselessness of the crime; and (5) the helplessness of the victim. *Id.* at 52, 659 P.2d at 11.

(Emphasis supplied.) See, also, *State v. Clabourne*, 142 Ariz. 335, 690 P.2d 54 (1984); *State v. Lambright*, 138 Ariz. 63, 673 P.2d 1 (1983).

In my view the Arizona Supreme Court opinion supports my assertion that there is only one prong and not two, as suggested by the majority.

With that background in mind I now examine what the majority has created as factors (1), (2), and (3) of the second prong: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; and (3) needless mutilation of the victim. It seems to me that no matter what gloss is placed upon factors (1), (2), and (3), they constitute a murder which is conscienceless or pitiless, and was unnecessarily torturous to the victim. Therefore, if I disregard factors (4) and (5) because of vagueness, I appear to be left with nothing more than a definition of "especially heinous" for "especially depraved." It is for these reasons I am unable to join with the majority in concluding that there are two distinct prongs to § 29-2523(1)(d). I believe that there is only one, and I would so hold.

That leads me to the second area in which I am unable to agree with the majority. I do not believe that the majority is correct in limiting the proportionality review required by the provisions of §§ 29-2521.02 to 29-2521.04 to only that pool of Nebraska cases in which the death penalty has been imposed

since April 20, 1973. I believe that the majority opinion in that regard is incorrect for at least three reasons: (1) The plain language of the act does not permit such a review; (2) The clear intent of the Legislature is contrary to the majority view; and (3) Common sense, in light of the objective sought to be accomplished by the Legislature as expressed in the act itself, is contrary to the majority view. For reasons which I will detail more fully hereafter, I believe that we are required to compare the case on appeal with all other cases of homicide involving the same or similar circumstances without regard to the penalty imposed.

The current Nebraska statutes prescribing when the death penalty is to be imposed are a combination of two separate acts, one passed in 1973 and the other in 1978, the acts having been slightly modified in 1978 and 1982. See, 1973 Neb. Laws, L.B. 268; 1978 Neb. Laws, L.B. 711; 1978 Neb. Laws, L.B. 748; 1982 Neb. Laws, L.B. 722.

The principal reason for adopting this series of statutes is clear. In 1972, in the now famous case of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the U.S. Supreme Court held that absent standards which prevent a state from imposing the death penalty in an arbitrary and discriminatory manner, statutes authorizing the use of the death penalty violate the eighth amendment to the U.S. Constitution. In an apparent effort to solve that problem, the Nebraska Legislature, in 1973, adopted L.B. 268. Specifically, L.B. 268 (codified as Neb. Rev. Stat. § 29-2519 (Reissue 1975)) set out the intent of the Legislature and provided:

> The Legislature hereby finds that it is reasonable and necessary to establish mandatory standards for the imposition of the sentence of death; that the imposition of the death penalty in every instance of the commission of the crimes specified in section 28-[303] fails to allow for mitigating factors which may dictate against the penalty of death; and that the rational imposition of the death sentence requires the establishment of specific legislative guidelines to be applied in individual cases by the court. The Legislature therefore determines that the death penalty should be imposed *only* for the crimes set forth in

> section 28-[303] and, in addition, that it shall *only* be imposed in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances, as set forth in sections 29-2520 to 29-2524.

(Emphasis supplied.) This may be contrary to the view held by some that anyone who kills should be put to death, but it is the will of the Legislature as expressed in its enactment of L.B. 268.

The Legislature then adopted a list of aggravating circumstances and mitigating circumstances to be considered first by the sentencing court and thereafter by the Supreme Court on appeal, the appeal to the Supreme Court being automatic. See Neb. Rev. Stat. § 29-2525 (Reissue 1985). The death penalty is not to be imposed unless the aggravating circumstances outweigh the mitigating circumstances. Neb. Rev. Stat. § 29-2522 (Reissue 1985).

A second step, however, was added to the Supreme Court's review procedure in 1978 when the Legislature adopted L.B. 711. See 1978 Neb. Laws, L.B. 711. In adopting L.B. 711 the Legislature made further specific legislative findings which became a part of the law. Neb. Rev. Stat. § 29-2521.01 (Reissue 1985) provides:

> The Legislature hereby finds that:
>
> (1) Life is the most valuable possession of a human being, and before taking it, the state should apply and follow the most scrupulous standards of fairness and uniformity;
>
> (2) The death penalty, because of its enormity and finality, should never be imposed arbitrarily nor as a result of local prejudice or public hysteria;
>
> (3) State law should be applied uniformly throughout the state and since the death penalty is a statewide law an offense which would not result in a death sentence in one portion of the state should not result in death in a different portion;
>
> (4) Charges resulting from the same or similar circumstances have, in the past, not been uniform and have produced radically differing results; and
>
> (5) *In order to compensate for the lack of uniformity in*

> *charges* which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze *all* criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances.

(Emphasis supplied.)

To carry out that legislative mandate, the Legislature then imposed upon *only* the Supreme Court an obligation to, within a reasonable time after July 22, 1978, review and analyze *all* cases involving criminal homicide committed on or after April 20, 1973. Section 29-2521.02 provides: "Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) *the charges filed*, (3) the crime for which defendant was convicted, and (4) *the sentence imposed*. Such review shall be updated as new criminal homicide cases occur." (Emphasis supplied.)

Using this compilation of cases, the Supreme Court is required, upon appeal, to determine "the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances." § 29-2521.03.

The plain language of the act seems to make it clear that *all* criminal homicide cases are to be reported to the Supreme Court and that the Supreme Court, in conducting its review, is to look at *all* of these cases and to then compare the case on appeal with those other cases having same or similar *circumstances*, not penalties, to determine whether the imposition of the death penalty in the case on appeal is more severe than that imposed in other cases having same or similar circumstances. As pointed out in our opinion in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), that is no easy task. We said in *Williams, supra* at 77, 287 N.W.2d at 29: "It would be virtually impossible to find two murder cases which are the same in all respects." Nevertheless, difficult as the task may be, unless we declare the act unconstitutional, we are duty-bound to follow it.

In that regard it should be noted that the U.S. Supreme Court does not require a proportionality review to be conducted before imposing the death penalty. As noted by the majority, in the case of *Pulley v. Harris*, 465 U.S. 37, 42-45, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984), the U.S. Supreme Court held:

> At the outset, we should more clearly identify the issue before us. Traditionally, "proportionality" has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular crime. Looking to the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes, and to sentencing practices in other jurisdictions, this Court has occasionally struck down punishments as inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime. . . .
>
> . . . .
>
> . . . In *Furman*, the Court concluded that capital punishment, as then administered under statutes vesting unguided sentencing discretion in juries and trial judges, had become unconstitutionally cruel and unusual punishment. The death penalty was being imposed so discriminatorily, *id.*, at 240 (Douglas, J., concurring), so wantonly and freakishly, *id.*, at 306 (Stewart, J., concurring), and so infrequently, *id.*, at 310 (White, J., concurring), that any given death sentence was cruel and unusual. In response to that decision, roughly two-thirds of the States promptly redrafted their capital sentencing statutes in an effort to limit jury discretion and avoid arbitrary and inconsistent results. . . .
>
> Four years after *Furman*, this Court examined several of the new state statutes. We upheld one of each of the three sorts mentioned above. See *Gregg v. Georgia, supra; Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). Needless to say, that some schemes providing proportionality review are constitutional does not mean that such review is indispensable. We take statutes as we find them. To endorse the statute as a whole is not to say that anything different is unacceptable. . . .

> Examination of our 1976 cases makes clear that they do not establish proportionality review as a constitutional requirement.

The U.S. Supreme Court went on to say at 50-51:

> There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it. Indeed, to so hold would effectively overrule *Jurek* and would substantially depart from the sense of *Gregg* and *Proffitt*. We are not persuaded that the Eighth Amendment requires us to take that course.

Nevertheless, the Nebraska Legislature has not repealed that portion of its statutes which requires this court to conduct a proportionality review, and, therefore, this court must abide by the requirements of the statute or declare it unconstitutional.

The majority has chosen a middle ground. It has suggested that if we follow the language as it is written by the Legislature, the act will be rendered unconstitutional; therefore, we shall interpret it by changing the language in order to declare the act constitutional.

While the effort by the majority is commendable, I do not believe it judicially proper. Judicial activism, regardless of the result, is still judicial activism and should not be undertaken by a court. It is our function to interpret the law and, if ambiguous, give it meaning. It is not our function, however, to redraft an act which is clear and unambiguous. As we observed in *State v. Roth*, 222 Neb. 119, 124, 382 N.W.2d 348, 352 (1986): " 'Whether a court considers particular legislation as wise or unwise is irrelevant to the judicial task of construing or applying a statute.' " And in *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986), we said: "In the absence of anything indicating the contrary, statutory language should be given its plain and ordinary meaning. Where words of a statute are plain and unambiguous, no interpretation is necessary to ascertain the meaning of language in a statute." (Syllabus of the court.)

The language of § 29-2521.03 is clear and unambiguous and, thus, requires no interpretation by this court. To read meaning into the statute by limiting the review to be conducted by this

court to those cases in which the death penalty has been imposed is to rewrite the statute. One need only read the statement of intent set out in § 29-2519 and the legislative findings set out in § 29-2521.01 to recognize that this court is to compare the case on appeal not only with those in which the death penalty has been imposed but, more importantly, also with those in which the death penalty has not been imposed. The legislative findings clearly require that by providing in part:

> In order to compensate for the lack of uniformity in *charges* which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances.

(Emphasis supplied.) § 29-2521.01(5).

Moreover, an examination of § 29-2521.02 further makes it clear what it is we are to do. That section requires the Supreme Court, within a reasonable time, to review and analyze *all* cases involving criminal homicide. It would not have been difficult to limit the language of § 29-2521.02 if the review was to be limited to those few cases in which the death penalty had been imposed. There would be little reason to review and analyze, as required by § 29-2521.02, "(1) the *facts* including mitigating and aggravating circumstances, (2) the *charges* filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed" (emphasis supplied), or to require that "all" homicide cases be forwarded to the Supreme Court, or to require the Supreme Court to review *all* homicide cases if the ultimate review is limited to those few cases where the death penalty is imposed. The language of the act simply will not, absent painful distortion, permit a finding that the review is to be limited to only cases in which the death penalty had been imposed.

In 1977, in the case of *State v. Simants*, 197 Neb. 549, 563-64, 250 N.W.2d 881, 890 (1977), we told the Legislature:

> The Supreme Court has indicated in its opinions that meaningful appellate review may be required to insure that the death penalty is not applied in an arbitrary or

> capricious manner. . . . While we do not have the Georgia provision for proportional review, every capital case where there can be the slightest question will be considered in comparison with other capital cases. In other words, we will compare each capital case under review with those previous cases in which the death penalty *has or has not been imposed* under the new statute. By this means review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case.

(Emphasis supplied.)

While *Simants* was decided even before the adoption of L.B. 711, the legislative history of L.B. 711, as will be shown, indicates that it was adopted in part to codify what this court had said it was already doing.

We then decided *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), wherein the majority now claims we said that, in conducting the proportionality review required by § 29-2521.02, we would examine only cases in which the penalty of death has been imposed. However, we attached to our opinion in *Williams* an addendum indicating the cases that had been analyzed and reviewed as of November 1, 1979. There were 32 cases. The death penalty had only been imposed in six such cases, the balance receiving life sentences. To therefore suggest that *Williams* stands for the proposition that we were limiting our review to cases in which the death penalty had been imposed is simply not supported by the record.

We followed *Williams* with *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), and then with *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), which we have now overruled in this case. In *Moore* and *Reeves* we held that we were comparing *all first degree* murder convictions, whether the death penalty was imposed or not. While the rationale of *Moore* and *Reeves* makes somewhat more sense than the rationale of *Williams*, there is nothing in the statute which limits the comparisons to first degree murder cases, and such a limitation appears contrary to the words and the intent of the statutes.

In *Moore* this court held that the proportionality review, to be constitutional, must be limited to cases in which the

defendant had been convicted of first degree murder. The court reasoned that any additional review would violate the separation of powers between the judicial and executive branches because such a review would, of necessity, require the court to gather evidence and examine prosecutorial decisions in filing charges.

While I do not agree with the conclusion that if we were to follow the statutes, as directed by the Legislature, the act would be unconstitutional, if, in fact, one accepts that view, we have no choice but to declare the act unconstitutional and cannot remedy alleged unconstitutional defects by redrafting the statutes and deleting words. As we said in *Metropolitan Utilities District v. City of Omaha*, 112 Neb. 93, 101, 198 N.W. 858, 861 (1924), "when a legislative act clearly violates a specific constitutional declaration the court has no recourse, but to declare the act invalid."

It seems somewhat of an anomaly for us, on the one hand, to say that if we do what the Legislature has directed us to do, it will constitute a violation of the doctrine of separation of powers, and, on the other hand, to seek to remedy what we declare to be a constitutionally defective statute by invading the province of the Legislature and redrafting the act will not constitute such a violation. How following the act violates the doctrine regarding the separation of powers, but redrafting the act, clearly a legislative function, does not, escapes me. If the act is unconstitutional, let us say so and declare it to be invalid.

I do not, however, believe that such declaration is either necessary or proper. Rather, I believe that the act is constitutionally drafted. It may not be constitutionally required, but, having been adopted by the Legislature, it should not now be rewritten by us. In my view the position set out in the majority opinion in *Moore, supra*, is flawed. I now examine the underlying reasons given by the *Moore* decision, one by one.

I. *The Legislature cannot, by subsequent legislation, divest rights which vested by virtue of a judgment.* L.B. 711, as adopted by the Legislature, does not divest any rights which have been vested. We are not permitted to change the judgment in any case we are comparing. Our authority is limited solely to the case on appeal.

II. *The Legislature cannot enact legislation to retroactively open or vacate a judgment.* L.B. 711, as adopted by the Legislature, does not retroactively open or vacate a judgment. The cases which we compare are final and binding and cannot be affected by anything we do in the case on appeal. We do not change anything in those cases. We only compare the present case with the final results in those other cases. The function we perform is no different whether we use cases in which the death penalty has been imposed or whether we use cases in which the death penalty has not been imposed.

III. *The limits of the jurisdiction conferred upon the Supreme Court by the Constitution may not be increased or extended by legislative enactment.* L.B. 711, as adopted by the Legislature, does not increase or extend our jurisdiction. Our jurisdiction is to examine the case on appeal. What we compare that case with is not prescribed by constitution. If we can compare it to cases in which the death penalty has been imposed, we can constitutionally compare it to cases in which the death penalty has not been imposed.

IV. *The Legislature cannot change procedures established by the Constitution.* L.B. 711, as adopted by the Legislature, does not change procedures established by the Constitution. There is no constitutional procedure for reviewing a case in which the death penalty has been imposed.

V. *The Legislature cannot interfere with the judicial function of adjudicating the facts of an acquittal.* L.B. 711, as adopted by the Legislature, does not interfere with the judicial function of adjudicating the facts of an acquittal. The acquittal is not before us for adjudication, only for comparison with the case we are to review. Nothing done by virtue of L.B. 711 can affect an acquittal once rendered. It is not the comparison cases we rule upon, but only the case being examined on appeal.

VI. *The Legislature may not reverse a judgment.* L.B. 711, as adopted by the Legislature, does not permit the court to reverse any other decision except the case on appeal. Obviously, we have authority to reverse a case on appeal.

VII. *The Legislature may not direct the disposition of a case in which jurisdiction has attached.* L.B. 711, as adopted by the Legislature, does not *direct* a disposition. It merely prescribes

the standards we are to use in exercising our judgment. Notwithstanding anything contained in L.B. 711, we may still uphold the imposition of the death penalty in a proper case. Nothing about L.B. 711, as currently enacted, requires the court to reach any directed specific decision. All it requires of us is to use all homicides before imposing the death penalty. In my view the Legislature has clear authority to do that. Courts do not have inherent authority to impose the death penalty. Absent a statute enacted by the Legislature, neither a crime nor a punishment may exist. See, *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986); *Kinnan v. State*, 86 Neb. 234, 125 N.W. 594 (1910). If the Legislature, then, can, within its power, prescribe whether the death penalty may be imposed in the first place, it seems to me it can prescribe the conditions under which it may be imposed. Our function is merely to examine the evidence to determine that the prerequisites established by the Legislature have been met.

Contrary to the position taken by the majority, either in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), or in this case, I do not believe we are asked to gather evidence or look behind prosecutorial discretion. The evidence is to be brought to us, just as all evidence is brought to us, and we are to accept on their face the decisions of the prosecutors. This is precisely what we do when we examine any sentence pursuant to Neb. Rev. Stat. § 29-2308 (Reissue 1985) to determine whether the sentence imposed is excessive.

An examination of the legislative history underlying the adoption of both L.B. 268 in 1973 and L.B. 711 in 1978 unequivocally establishes the fact that the Legislature did not intend to limit the examination to those cases in which the death penalty had in fact been imposed. In introducing L.B. 711 the sponsor, Senator Ernie Chambers, filed a statement which began as follows: "The following constitute my reasons for this bill and the purposes sought to be accomplished thereby:" Statement of Purpose, L.B. 711, Judiciary Committee, 85th Leg., 2d Sess. (Jan. 24, 1978). Senator Chambers then proceeded to explain the various reasons for his bill. He concluded by saying: "Now, for convenience and clarity, I shall set out crucial propositions in the form of numbered items."

Thereafter followed 12 numbered items. Number 10 reads as follows: "If review and comparison are limited to cases where death is *actually imposed*, the base is too narrow and fails to take any cognizance of the multitude of similar cases (like those mentioned above) where the perpetrator of the homicide never faces the *risk* of death because of the action by the prosecutor in not charging 1st degree." Number 11 reads as follows: "If review of all criminal homicides (regardless of the charge filed or the punishment imposed) reveals that the death case before the Court carries a sentence which is different from that in similar homicide cases, the penalty will not stand." *Id.*

In a statement at the public hearing before the Judiciary Committee, Senator Chambers said in part:

> The Nebraska Supreme Court already recognizes a limited version of this proposal and mentioned it in the Simants decision which it handed down February 2, 1977. "While we do not have the Georgia provision for proportional review, we will compare each capital or death case under review with those previous cases in which the death penalty has or has not been imposed under the new statute." You'll see from this provision that the only cases that the State Supreme Court in Nebraska will review, are those where death has actually been pronounced. In this situation, that means five cases: Holtan, Ruse [sic], Stewart, Simants, and Peery. Those are the only cases. It's a very small circle and it does not provide the basis for the type of review the court itself indicates it's interested in. Now I'll go back to the statement. The Supreme Court limits its review to capital cases but completely ignores homicides where the facts and circumstances may have justified filing of a capital or death penalty charge, but for some reason, none was filed. This means that the Supreme Court's stated purpose for reviewing and comparing cases is effectively defeated in the vast majority of instances. . . . If in past cases, prosecutors have shown by the charge they filed that they rejected the death penalty or judges who received pleas of guilt to first degree murder or convictions of first degree murder and they rejected the death penalty by not imposing it, those cases nevertheless

> should be reviewed to determine whether the circumstances would have warranted the death penalty, if in the case before the court now, the circumstances were similar and death was pronounced as a sentence.

Judiciary Committee Hearing, L.B. 711, 85th Leg., 2d Sess. 33-34, 36 (Jan. 24, 1978). The statement makes it clear that the intent of the act was to expand the cases to be included in the review.

Furthermore, an examination of the floor debate discloses what the Legislature, or at least those who voted in favor of L.B. 711, had in mind. Senator Clark asked Senator Chambers:

> SENATOR CLARK: Does not the Supreme Court, at the present time, review the case after the death penalty has been imposed by the district court?
>
> SENATOR CHAMBERS: They review the individual case but they don't compare them with the cases where the death penalty *was not imposed*. They do not make a comparison of case against case. They review the case itself.

(Emphasis supplied.) Floor Debate, L.B. 711, Judiciary Committee, 85th Leg., 2d Sess. 7377 (Mar. 8, 1978).

Senator Chambers then further said in part:

> The State Supreme Court under this bill will not merely review an individual case to see whether errors were committed in that case but it will compare the cases of criminal homicide throughout the state to see just what kind of cases ought to carry the death penalty and which kind ought not. And if a person who commits a crime in Scottsbluff [sic] County will escape the death penalty because he or she lives in that county, while for the same thing being sentenced to death in Douglas County, then the death penalty is not a state law. The death penalty is broken up into 93 different laws interpreted solely and only in the discretion of the individual prosecutor. I am saying that the Supreme Court should be authorized to compare all of these cases where criminal homicide has occurred and rectify some of the disparities, some of the differences, radical differences, which have occurred as a result of the difference in attitude among prosecutors.

> This bill, remember, causes a comparison among cases. Currently an appeal merely reviews an individual case. So it might be like you have a hundred people in this room. You give each one a physical to see whether he or she is healthy. Then you compare all of them with each other to see which is the healthiest. One is an individual review. The other is a comparison. 711 adds the concept of the comparison and I think only through a procedure such as this can the arbitrariness be taken away, and Senator Clark, when I say arbitrariness, I am saying that similar circumstances do not result in a similar result in this state, and if you review the cases of people on death row, there are others in the penitentiary who have confessed to crimes far more atrocious than those committed by the ones who are currently awaiting death and those who are not on death row naturally will not die and I think that is not proper and the purpose of this law is to bring about uniformity.

Id. at 7378.

Reading the clear meaning of the statutes in light of the debate leads one to the conclusion that the comparison review must encompass *all* cases involving homicide, whether the death penalty was imposed or not.

Finally, in my view, common sense dictates that no other rational conclusion can be reached. The purpose of L.B. 711 was to ensure that persons were not being arbitrarily sentenced to death. To therefore suggest that we look only at those individuals who may have been discriminated against to determine whether or not they have been discriminated against is an exercise in futility. If one wants to determine whether individuals are being discriminated against in public transportation, one does not merely look at those who are required to sit in the back of the bus and conclude that since everyone in the back of the bus looks alike, there is no discrimination. One, of necessity, must look at who is riding in the front of the bus as well in order to determine whether the persons in the back are being discriminated against. So, too, there is no way that we can determine whether those who are sentenced to death are being discriminated against if we do not

examine those cases having the same or similar circumstances which, for whatever reason, did not result in the imposition of a death sentence.

I have attached to this concurrence and dissent a list of 185 cases in which individuals have been involved in the killing of another and have been convicted or have pleaded guilty to either first degree murder, second degree murder, or manslaughter or less. Of that number only 13 resulted in the imposition of the death penalty. The percentage of times the death penalty has been imposed in Nebraska since 1973 as compared to the total of such murders is 7 percent. While that may be justified, to limit the comparison we make pursuant to L.B. 711 to 7 percent of the cases is to totally ignore the obvious intent and purpose of the act. I believe we have no other choice but to review all homicide cases having the same or similar circumstances. One may argue that there may be other cases wherein homicides were committed but charges less than first degree murder, second degree murder, or manslaughter were filed. That may be true, but under the record currently before us, and in view of the few cases in which the death penalty has been imposed as compared to the total number of known homicide cases having the same or similar circumstances, the absence of those additional cases, whatever they may be, can only further exacerbate the result of the review in this case. There is nothing about those cases which will be helpful in determining whether there is discrimination in this case.

I would interpret L.B. 711 to require that the Supreme Court must review all homicide cases having the same or similar circumstances, the records of which are filed with the court pursuant to §§ 29-2521.02 and 29-2521.04, regardless of the penalty imposed, and would not limit the review to those cases in which the death penalty was imposed, as has been done by the majority. Using this broader standard of review, I believe a review of all of those cases, in light of the mandates imposed upon the states by the U.S. Supreme Court, leads to the conclusion that the imposition of the death penalty in this case is arbitrary and discriminatory and cannot stand. The decision has nothing to do with what is morally appropriate; only with what is legally permitted. A state's authority to execute must be

strictly interpreted and fully complied with before the sentence may be carried out.

Of the 185 cases set out in the attached list, it would appear that 57 of them involved robberies and murders. Those cases are identified in the list by placing an asterisk in front of the name of the case. Of that total number only six of the robbery/murders resulted in the imposition of the death penalty. In 51 of the cases a sentence of life imprisonment or less was imposed. This means that the death penalty was imposed in only 10.5 percent of the cases involving the same or similar circumstances, while in 89.5 percent of the cases the death penalty was not imposed. As we have already recognized, it is not easy to determine whether one murder is the same as or similar to another. At a minimum, all of the cases involved a situation in which the defendant attempted to or did in fact rob the victim as well as kill the victim.

A closer look at the facts of some of these cases reveals that many of these 51 cases involving a robbery and a murder where a sentence of life imprisonment or less was imposed have not only similar but nearly identical fact patterns to the instant case. For example, in *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193 (1978), the defendant robbed a gas station. He ordered the attendant to lie down. When the defendant suspected that the victim was moving behind the counter to get something, the defendant hit him with his gun. The gun went off, and the victim eventually died from a gunshot wound to the heart. Defendant was sentenced to life in prison for first degree murder.

In *State v. Domingus*, Lincoln County District Court, Docket 92, Page 31, the defendant pleaded no contest to first degree murder. The record discloses that the victim was viciously beaten by the defendant, sustaining a considerable amount of bruising in the area of the eyes and nose. In the opinion of the pathologist, the victim was alive when she sustained the facial injuries. She ultimately died of massive head injuries after she was beaten with a wooden board. The defendant was convicted of first degree murder and was sentenced to life imprisonment, plus up to 20 additional years for the beating death of the woman.

And in *State v. Suffredini, ante* p. 220, 397 N.W.2d 51 (1986), the defendant pleaded no contest to second degree murder. The facts disclose that the defendant murdered the victim immediately outside the door of a men's restroom at a rest stop along Interstate 80. The victim was shot five times, and between $180 and $240 was stolen from him. The defendant was sentenced to life imprisonment for the murder, plus not less than 15 nor more than 45 years on the robbery and not less than 5 nor more than 15 years on the use of a firearm, all of the sentences to be served consecutively.

In *State v. Marshall*, Lancaster County District Court, Docket 48, Page 262, the defendant robbed the owner of a Lincoln flower shop. In the course of the robbery, the defendant struck and killed the owner with a metal bar. The defendant was convicted of first degree murder and sentenced to life imprisonment.

In *State v. Ware*, 219 Neb. 594, 365 N.W.2d 418 (1985), the defendant robbed a music store and shot the victim when the victim attempted to phone the police. Again, the defendant, charged with first degree murder, was sentenced to life imprisonment.

These cases, though not an inclusive list of all Nebraska cases with the same or similar circumstances as the instant case, clearly exemplify that what Palmer did, while morally repugnant and deserving of the maximum punishment permitted by law, was really no different from what many others have done and for which they received a life sentence. In Palmer's case there are no significant factors different from those in the 56 other cases listed, and, therefore, a comparison with the 56 cases seems appropriate.

Even if we exclude from this number those cases in which the defendant was less than 18 years of age at the time the robbery/murder was committed (identified by placing the letter *m* following the asterisk on the attached list), we still find that there are a total of 47 cases involving a robbery and a murder. Of that number only six resulted in the imposition of the death penalty. That means that, disregarding those cases in which the defendant was less than 18 years of age, the death penalty for murdering an individual while attempting to or in fact robbing

the individual was imposed in only 12.8 percent of the cases, while life imprisonment or less was imposed in 87.2 percent of the cases. Therefore, it appears to me that, absent additional aggravating factors, a sentence of death in this case is disproportionate. The selection of six to be executed, including Palmer, is arbitrary and capricious and, therefore, in violation of the eighth amendment to the U.S. Constitution. As the U.S. Supreme Court said in *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980): "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."

One of the factors suggested as to why this case falls into the limited category is that this is an example of a case in which the victim was bound before being murdered. There is some brief testimony to that effect. The testimony comes solely from the defendant's wife, Cherie Palmer, who testified, in response to a single question, as follows:

> Q. What did you observe?
>
> A. Mr. Zimmerman was lying on his back on one of the beds . . . . His hands and his feet were tied.

There is, however, much evidence to contradict that statement. One of the police officers who was called to the scene testified as follows:

> Q. . . . Was Mr. Zimmerman's hands or legs bound when you observed him?
>
> A. No.
>
> Q. . . . You weren't the first one up there to see him, isn't that right? You weren't the first person —
>
> A. No, I was not.
>
> Q. But you have determined that he was not bound at the time he was found, is that —
>
> A. That's definitely correct.

This testimony is supported by the pathologist, who, likewise, testified as follows:

> Q. Did you observe any abrasions or bruises around the hands or the wrists of the decedent?
>
> A. No, sir.
>
> Q. Did you examine them for those?

A. Yes, sir.

Q. Did you make an examination as to whether or not the decedent had been tied up in the hands area then?

A. There were no findings that would suggest to me that that had taken place, sir.

While that testimony is not intended to minimize the horror of the murder, for, indeed, it does not, it is intended to point out that the murder in this case was not significantly different from most other cases having the same or similar circumstances in which the death penalty has not been imposed.

In the original case of *Furman v. Georgia*, 408 U.S. 238, 309, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), Justice Stewart said: "[I]t is equally clear that these sentences are 'unusual' [in the eighth amendment sense] in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare." He went on at 309-10 to say:

> For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

It was this very fact that prompted the Supreme Court of the United States to declare the death penalty in the *Furman* decision to be in violation of the federal Constitution, and that apparently prompted the Nebraska Legislature to adopt L.B. 711. This is not a case in which the court is passing upon the morality of the death penalty but, rather, a case wherein, as required by statute, we are to proportionately review the imposition of the death penalty in this case as compared to those criminal homicide cases having the same or similar circumstances. It occurs to me, therefore, that we have no alternative, so long as we are required to make a proportionality review, but to conclude that the imposition of the death penalty for the murdering of an individual in the commission of a robbery, under the facts of this case, is

arbitrary and capricious and cannot stand. This is not a pleasant choice to have to make. Nevertheless, doing what the law requires of a court is sometimes not pleasant, but always required. If the Legislature, indeed, wishes us not to follow the rule it has adopted for us, all it need do is repeal L.B. 711 which requires this court to engage in a proportionality review.

For these reasons I believe that the sentence of death in this case cannot stand and that Palmer, having been convicted of the murder, should be resentenced to a term of imprisonment for the balance of his natural life, never to be released from prison or permitted to be free again.

ANALYSIS OF CRIMINAL HOMICIDE CASES FOR USE IN COMPARING DEATH PENALTY CASES UNDER L.B. 711

I. FIRST DEGREE MURDER CONVICTIONS—DEATH PENALTY IMPOSED.

**State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977).

Date of Sentence: October 30, 1975.

On February 21, 1975, defendant and Ronald Ell robbed a Hinky Dinky Store in Omaha, Nebraska. The store manager and several employees pursued the robbers. The getaway car was intercepted by a policeman in a cruiser, who also chased the robbers. Shots were exchanged, and the robbers fled the getaway car. They were pursued by several officers and by a civilian, Michael Kellogg, who had armed himself and was attempting to capture Rust and Ell. Kellogg was shot four times and killed by Rust. Rust was later apprehended.

**State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977).

Date of Sentence: February 9, 1976.

Defendant robbed a bar in Omaha, Nebraska, after tying up certain persons then in the bar, including some customers. Holtan then put a gun to the head of one of the individuals. The individual's boyfriend yelled, "Oh, my God, no," at which point Holtan shot the boyfriend and the girlfriend. The boyfriend died as a result of the gunshot wounds.

**State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977).

Date of Sentence: June 24, 1976.

Defendant robbed a coin shop in Lincoln, Nebraska. He

tightly bound the owner's wrists behind her, and also bound her ankles. He then shot her three times at close range, once in the right temple, once between the eyes, and once through the roof of the mouth, directly into the brain, and robbed the store of rare coins and watches.

State v. Otey, 205 Neb. 90, 287 N.W.2d 36 (1979).

Date of Sentence: June 20, 1978.

Defendant was walking home after a night out drinking. Through a window, he saw the victim sleeping on a sofa on the first floor of her house. He entered through the back door, took her stereo, and carried it outside. He reentered, and the victim was awakened. He told the victim he was going to rob and rape her. She fought back, and defendant cut her across the forehead with his knife. He then raped the victim and inquired if she had any money. He forced her upstairs to get the money, leaving a trail of blood droplets behind her. Defendant stated that while he was starting to stab her, she pleaded for him to kill her. He then hit her four or five times over the head with a hammer and strangled her with a belt.

State v. Williams, 205 Neb. 56, 287 N.W.2d 18 (1979).

Date of Sentence: June 23, 1978.

On August 11, 1977, defendant came to the home of one of the victims, Patricia McGarry, a close personal friend. They argued over a gun which Williams had purchased, presumably to commit suicide. A friend of McGarry's, Catherine Brooks, arrived and became involved in the incident. During this time, Williams shot McGarry and Brooks three times each in or about the head. The autopsy of Brooks' body also evidenced sexual contact, although Williams denies this. After these murders defendant went to the apartment of an acquaintance and asked to use the telephone. She admitted him, and he then told her he needed to stay for a while. She suggested that he stay in the storage room area of the apartment complex, whereupon Williams drew a revolver and raped her as many as six times. He then left and traveled through Iowa, where he sexually assaulted and shot and killed a woman, and then made his way to Minnesota, where he shot and raped another woman.

State v. Anderson and Hochstein, 207 Neb. 51, 296 N.W.2d 440 (1980).

Date of Sentence: August 24, 1978.

The defendant Anderson was an employee of Commercial Realty, owned by one Abboud. The other defendant, Hochstein, was a close friend of Anderson. Anderson was upset with some of Abboud's business practices and apparently felt that he was not getting the correct commission checks that he was owed. Anderson discussed with Hochstein several alternative ways of getting rid of Abboud, including hiring someone to kill Abboud, using a knife and explosives. About a week before the murder, Anderson and Hochstein, along with Lon Reams, began seriously discussing the murder of Abboud. Hochstein offered to execute Abboud for $1,500. Anderson agreed, and the three then planned the actual murder. Hochstein inveigled Abboud to meet him at 168th and Q Streets in Omaha. This location was chosen because it was property listed with Abboud's company and because it was out of the way. The murder was postponed, however, because Abboud had several other people in the car during this meeting. The second meeting was arranged for the next day, whereupon Hochstein shot Abboud three times, once in the head, once in the neck, and once in the back. Both Anderson and Hochstein were sentenced to death.

State v. Harper, 208 Neb. 568, 304 N.W.2d 663 (1981).

Date of Sentence: November 7, 1979.

Harper was involved in an emotional relationship with Sandra Johnson in 1973 and 1974. The relationship deteriorated, and Sandra told Harper that she intended to marry a Duane Johnson. The marriage did in fact take place, and Harper threatened to kill them both when Sandra refused to annul the marriage. In 1975 Harper fired a shotgun at a group gathering outside Sandra's mother's home and was arrested and sentenced to serve time in the penal complex for shooting with intent to kill, wound, or maim. Upon release, he was employed by the Eppley Research Institute in Omaha, from which he took some lethal carcinogenic drugs and put them in the milk and lemonade in the refrigerator at Sandra Johnson's home. Various family members drank the milk and lemonade. Five became ill and two of the five (Sandra's husband and her 11-month-old nephew) died.

**State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982).

Date of Sentence: June 20, 1980.

On August 22, 1979, Moore robbed and killed an elderly cabdriver. His motive was simply robbery, and he made several calls for cabs and waited until an older cabdriver arrived. Four days later he repeated this scheme, killing and robbing another cabdriver.

State v. Reeves, 216 Neb. 206, 344 N.W.2d 433 (1984).

Date of Sentence: September 11, 1981.

Defendant entered victim's house by way of a back window and proceeded to the second floor bedroom. He ripped the telephone cord out in an effort to isolate the victim from the outside world. He stabbed her seven times in the chest in perpetration of or attempt to perpetrate a sexual assault. A second victim, a girlfriend and guest staying overnight with the first victim, was also found stabbed inside the doorway to the victim's bedroom. Both women were killed by stabbing.

**State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

Date of Sentence: September 6, 1984.

Defendant and his wife robbed a coin shop in Grand Island, Nebraska. The victim was struck on the head and tied up. He was then taken upstairs to a bedroom, where he was watched by defendant's wife while defendant robbed the shop. Defendant then came upstairs and sent his wife downstairs. While downstairs, she heard thumping noises and a low, throaty, chant-like sound. The victim was found dead upstairs, having been strangled with an electrical cord.

State v. Joubert, 224 Neb. 411, 399 N.W.2d 237 (1986).

Date of Sentence: October 9, 1984.

Defendant kidnaped a young paperboy on September 18, 1983. He bound his hands and feet, taped his mouth, and put him in the trunk of defendant's car. He later removed all of his clothes except for his undershorts, though he did not sexually molest the child. The child was stabbed 11 times. On December 2, 1983, the defendant kidnaped another young boy, whom he forced to lie down in the front of the automobile. When the body was found, it too was clad only in undershorts, though the victim had not been sexually molested. He had been stabbed

seven times and roughly grabbed around the neck. Joubert confessed to the killings and pleaded guilty. He admitted that despite the pleas of the young boys, he drove to secluded places, told them to get out of the car, and coolly stabbed both of them to death because he was curious about how people died.

**State v. Bird Head*, appeal pending.

Sheridan County District Court, No. C1802.

Date of Sentence: March 18, 1986.

Defendant bound, beat, sexually assaulted, and murdered the victim in her home. When apprehended, he was intoxicated and was driving the victim's automobile.

II. FIRST DEGREE MURDER CONVICTIONS—SENTENCED TO LIFE IMPRISONMENT.

State v. Andersen, no written opinion.

Dawson County District Court, No. 14391.

Date of Sentence: July 26, 1973.

Defendant and his wife resisted arrest by a patrolman, and in the struggle in the police car the patrolman was shot and killed.

**State v. Kennedy*, no written opinion.

Lancaster County District Court, Docket 37, Page 72.

Date of Sentence: September 26, 1973.

Defendant was in need of money and decided to rob someone. He first attempted to rob a home but, because of a barking dog, was unable to do so. He shot the dog with a 12-gauge shotgun and left. He then returned to Kramer Lake, where he had been earlier fishing, and approached a victim, who was also fishing. The defendant shot the fisherman in the back and proceeded to rob him. The victim was still alive, so the defendant shot him three more times.

**State v. Casper*, 192 Neb. 120, 219 N.W.2d 226 (1974).

Date of Sentence: December 13, 1973.

Defendant and several friends spent the evening at several Omaha bars. They were later joined by the victim, who promised them a night on the town. Defendant was aware that the victim had two $100 bills on his person. Defendant maintained that the victim pulled a knife on the others, fearing that he, the victim, was going to be robbed. A struggle ensued

between one of the parties and the victim. The other party got the knife away from the victim. He then ordered the victim to hand over the money. Defendant admitted that he joined in the robbery attempt. At some point the victim ended up in the river. It was not clear from the testimony whether he fell down the riverbank or was pushed. Both defendant and the other party maintain that the victim was unharmed and standing in shallow water when they left him. His body was found several days later, floating in the Missouri River.

*_State v. Wilson_*, 192 Neb. 435, 222 N.W.2d 128 (1974).

Date of Sentence: January 4, 1974.

Same facts as in _State v. Casper_, above.

State v. Nokes, 192 Neb. 844, 224 N.W.2d 776 (1975).

Date of Sentence: March 22, 1974.

Defendant and his wife had entered into an adulterous relationship with the daughter of the victims. The relationship became estranged, and the difficulty led to verbal and physical altercations between the defendant and the victims' daughter. The victims became aware of the situation and thought defendant was blackmailing their daughter. Defendant and his wife went to the victims' residence to settle the misunderstanding. Defendant took a gun with him. Later, the four went to defendant's home and down to the basement. While in the basement, defendant shot and killed the father of the daughter involved in the relationship. When the mother screamed and tried to run up the stairs, defendant shot her in the back. Defendant and his wife then dismembered the bodies, wrapped the pieces in butcher paper, and later disposed of the bodies in a nearby lake.

*_State v. Brown_*, no written opinion.

Douglas County District Court, Docket 88, Page 625.

Date of Sentence: March 25, 1974.

Defendant gave the victim, an acquaintance, a ride. They stopped near the Carter Lake area and got out of the car. After telling the victim that defendant did not get the job he had hoped to get, he struck the victim and robbed her of $82. She died from the beating, with massive contusions to the neck, and five cracked ribs.

State v. Russell, 194 Neb. 64, 230 N.W.2d 196 (1975).

Date of Sentence: May 31, 1974.

The victim, a young boy, was a friend of defendant's younger brother. Defendant, a teenager, and victim went shopping together. They then entered an abandoned apartment. Once inside, they talked, ate doughnuts, drank coffee, and engaged in homosexual activity for a brief period of about 5 minutes, apparently at the victim's request. Defendant claimed that victim started calling him names and also made derogatory statements about defendant's grandmother. Defendant got mad, cut the cord off the telephone, and strangled the victim. The victim's face turned red and his eyes bulged. Defendant left victim there, gasping for air. The victim was 8 years of age, and the defendant was 17 years of age.

*[m]*State v. Harris*, 194 Neb. 74, 230 N.W.2d 203 (1975).

Date of Sentence: June 26, 1974.

The victim, an 81-year-old woman, was walking home from the bus stop after attending church. She was encountered by the defendant and a codefendant, who attempted to snatch her purse. A struggle ensued, and the woman was knocked down and kicked several times. She was taken to the Douglas County Hospital by a rescue squad. She sustained a number of serious injuries, including a broken hip. She died 2 months later as a result of complications secondary to the injury.

*[m]*State v. Lytle*, 194 Neb. 353, 231 N.W.2d 681 (1975).

Date of Sentence: June 26, 1974.

Same as facts in *State v. Harris*, above. At the time of the assault Harris was 16 years of age and Lytle was 17 years of age.

*[m]*State v. McDonald*, 195 Neb. 625, 240 N.W.2d 8 (1976).

Date of Sentence: June 16, 1975.

On the evening of July 3, 1974, the defendant and two other youths were driven by a mother of one of the youths to a liquor store so that they could buy beer. Defendant was, at that time, 16 years old. Later that evening, defendant was informed that a car belonging to defendant's older brother had been hit. Defendant and his friend went outside and viewed the car. The victim was standing nearby, and there was a discussion between defendant and the victim as to whether the victim had hit the car. Defendant and his friend then went to the friend's trailer and got a gun and disassembled it. There was conflicting

testimony, but either the defendant or his friend hit the victim over the head. The two then stuffed the victim into the trunk of his car, stole his wallet, and shut the lid. The car was later set on fire. The defendant's friend testified that defendant went back to the car and, later, returned, stating that he had set the car on fire. The victim was found dead in the trunk by firefighters, who were called to the scene by a policeman who saw the burning car.

State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977).

Date of Sentence: August 20, 1975. Initially sentenced to death, but sentence reduced by Supreme Court.

The defendant was 16 years old at the time of the commission of the murder. He had developed a relationship with two drug dealers, who were supplying him with marijuana. He fell behind in his payments and was threatened by the dealers if he did not pay. Defendant advised the dealers that he needed 2 pounds of marijuana so that he could sell it and make a sufficient profit to pay the drug dealers. It was during this attempted transaction that the murder occurred. The dealers picked up Stewart in a van. The plan was to take Stewart to the house of the buyer so that the transaction could take place. Stewart actually had no buyer, and planned to steal the marijuana from the dealers. He had on his person his father's pistol and a can of gasoline. He told the dealers the gas was for a friend. While in the van, the defendant shot both dealers in the back of the head. One died immediately, but the other survived and witnessed the defendant pour gas all over the inside of the van and ignite it. After the defendant left, the injured dealer escaped from the burning van, and later testified.

State v. Sims, 197 Neb. 1, 246 N.W.2d 645 (1976).

Date of Sentence: September 19, 1975.

Defendant and the victim were involved in a near accident, which resulted in defendant's having words with the victim. After a brief conversation the defendant returned to his automobile. A short time later, the defendant returned to the area where the victim's car was parked. The passenger in the defendant's automobile stepped out of the car and fired a pistol in the air. The defendant removed a shotgun from the car and walked rapidly in the direction of the deceased, who was

standing against his car. The defendant stopped when he was about 10 feet away from the deceased and fired one shell, which struck the deceased in the abdomen, causing his death.

**State v. Ell*, 196 Neb. 800, 246 N.W.2d 594 (1976).

Date of Sentence: November 10, 1975.

This is a companion case to *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977). Because the evidence indicated that Rust did the actual shooting, Ell was sentenced to life imprisonment, being convicted of felony murder.

**State v. Record*, 198 Neb. 530, 253 N.W.2d 847 (1977).

Date of Sentence: July 2, 1976.

Defendant, 18 years of age, and another were driving in an automobile when they decided to rob anyone who next came along. They drove to approximately 180th and Dodge Streets in Omaha and parked on a side road, waiting for someone to drive by so that the defendant could shoot and rob someone. At approximately 3 a.m. a car driven by the victim passed their parked car, proceeding east on Dodge Street. With the other party driving, the victim's car was pursued. As their car drove alongside the victim's as if to pass, the defendant fired a shot, breaking the glass and killing the driver.

State v. Beans, 199 Neb. 807, 261 N.W.2d 749 (1978).

Date of Sentence: January 20, 1977.

Defendant and his wife (the victim) had concluded a bitter divorce and child custody proceedings. Defendant went to the victim's home to talk with her, taking his gun along with him. The victim had a gun in her purse. They argued, and defendant fired a shot into the wall. After the victim pulled the gun from her purse, the defendant attempted to knock it out of her hand; in the process the defendant's gun went off and the victim was killed with one shot to the abdomen.

**State v. Scott*, 200 Neb. 265, 263 N.W.2d 659 (1978).

Date of Sentence: May 6, 1977.

The defendant entered the home of William and Bertha McCormic in Omaha, Nebraska, and demanded money at gunpoint. A scuffle ensued, and Mr. McCormic, who was 92 years of age, was shot twice and died. Mrs. McCormic, who was 83 years old, was shot twice and wounded. The defendant was 18 years of age.

State v. Prim, 201 Neb. 279, 267 N.W.2d 193 (1978).

Date of Sentence: July 8, 1977.

Defendant robbed a gas station. He ordered the attendant to lie down. When defendant thought the victim was going behind the counter to get something, defendant hit him with his gun, and it went off. Defendant took the money and fled. The victim died from a gunshot wound to the heart. The defendant was 24 years of age.

State v. Simpson, 200 Neb. 823, 265 N.W.2d 681 (1978).

Date of Sentence: September 16, 1977.

The defendant, his sister, and his sister's child were hitchhiking and were picked up by the victim. They had formed a plan whereby they would get the driver to stop the car and defendant's sister would pull a gun and rob him. They stopped the car, but nothing happened. As they got back on the road, defendant's sister pulled the gun and told the driver to keep his hands on the wheel and stop the car. The driver turned to disarm her, and she shot him in the back. The victim was paralyzed, so they dragged him from the car into a borrow pit off the Interstate and took his billfold. The defendant fired two more shots to the head of the victim. The defendant was 20 years of age.

*[m]*State v. Schaeffer*, no written opinion.

Hall County District Court, Docket 28, Page 279.

Date of Sentence: September 30, 1977.

The defendant, a 16-year-old, together with a friend, forced the manager of the Ace Hardware Store in Grand Island into their car at gunpoint, where, after robbing him, they shot him 17 times.

State v. Roewert, no written opinion.

Platte County District Court, No. 2805.

Date of Sentence: December 8, 1977.

The defendant and some friends were drinking at a bar in Norfolk, Nebraska, and planned to rob and kill the victim. They determined they would kill the victim so as not to be identified. The defendant went and got some knives and lured the victim out of the bar by inviting him to a party. They drove him out to a country road, where they took his billfold. While the victim was passed out from being intoxicated, the defendant

cut his throat and then decapitated him. The defendant then disemboweled the victim, rolled the body over, and cut it about the back. The defendant was 23 years of age.

State v. Beers, 201 Neb. 714, 271 N.W.2d 842 (1978).

Date of Sentence: December 16, 1977.

Defendant and his wife were separated. After drinking he went home and put a double-barreled shotgun in his car. He then found his wife with another man and threatened to kill her. She fled to the home of one Steve Gruber. The defendant continued to drive about Nebraska City looking for his wife. Meanwhile, Gruber reported to the police that the defendant had made threats. Two officers proceeded to look for the defendant. Upon spotting one of the officers the defendant did a U-turn in the alley where he was and came back to the rear of the police station. The defendant stepped out of his pickup truck with his shotgun in hand. When he was ordered to put the gun down, he began firing, and a gun battle ensued. The defendant shot both officers, killing one of them. He then fled and was caught at a rest stop near York, Nebraska.

**State v. Marshall*, no written opinion.

Lancaster County District Court, Docket 48, Page 262.

Date of Sentence: March 13, 1978.

The defendant, a 20-year-old, working in a flower shop in Lincoln, Nebraska, robbed the owner, and in the course of the robbery struck the owner in the head several times with a metal bar, from which blows the victim died.

State v. Hatcher, no written opinion.

Douglas County District Court, Docket 101, Page 321.

Date of Sentence: April 14, 1978.

The defendant, being pursued by a police officer, engaged in a struggle with the police officer, and as the officer struggled with the defendant the officer's gun went off twice, the second time hitting the officer in the head.

**State v. Floyd*, no written opinion.

Hamilton County District Court, Docket 24, Page 196.

Date of Sentence: May 16, 1978.

Defendant, 37 years old, attempted to rob a filling station. The attendant advised the defendant that he knew kung fu, did a kung fu scream, and jumped into a kung fu stance. Defendant

shot the attendant three times in the head.

State v. Nielsen, 203 Neb. 847, 280 N.W.2d 904 (1979).

Date of Sentence: May 26, 1978.

Defendant returned from a hunting trip, during which time he consumed a great deal of alcohol. Upon returning home he engaged in an argument with his wife. He left for a while, and when he returned, found that his wife was gone. He then went to her parents' home to look for her and got into an argument with them. The defendant called his father-in-law an obscene name and shot once at the wall to show them that his gun worked. Defendant and his father-in-law stepped outside, where defendant then shot the father-in-law. The mother-in-law screamed, and was also shot when she went outside. The father-in-law died of a gunshot wound to the head, and the mother-in-law died of a gunshot wound to the neck and left upper posterior thorax.

**State v. Bennett*, 204 Neb. 28, 281 N.W.2d 216 (1979).

Date of Sentence: July 27, 1978.

While there was some dispute in the evidence, it appears that the defendant sought to rob the victim while on a public street. He struck the victim with a large rock, and then apparently became scared and called the rescue squad. He later went to the hospital to check on the victim's status. The victim died as a result of the head wounds inflicted by the rock.

*[m]*State v. Anderson*, no written opinion.

Douglas County District Court, Docket 102, Page 85.

Date of Sentence: September 25, 1978.

The defendant, a 15-year-old, together with his brother and a friend, decided to rob someone. The three were in one car and followed a man in another car until he stopped at a stop sign. Defendant got out of the car and pulled a gun on the victim, telling him to move over. The friend drove the victim's car, and the victim was placed in the passenger seat. Defendant got into the back seat. They drove around for several minutes and parked off the highway. They took the victim's billfold at gunpoint. When the victim started to struggle, the defendant shot him in the head.

State v. Robbins, 205 Neb. 226, 287 N.W.2d 55 (1980).

Date of Sentence: February 16, 1979.

The victim and his wife were separated. The victim was under the impression that his wife was having an affair with the defendant. Actually, the defendant was living with the wife's 16-year-old daughter. Defendant and a friend went to the victim's house, apparently to straighten out the misunderstanding. A fight ensued, and the defendant shot the victim six times. Defendant and his friend later returned and took money from the victim's wallet.

State v. Ditter, 209 Neb. 452, 308 N.W.2d 350 (1981).

Date of Sentence: November 15, 1979.

Defendant and his wife, the victim, were separated. Defendant went to his wife's apartment, where he broke in. He ordered a girlfriend of the victim to remove the parties' two minor children, and then ordered his wife to disrobe. While requiring his wife to beg for her life, he fired four shots into her body. Shots were fired at different intervals. When the police broke in, the victim was still alive, but died before the rescue squad arrived.

**State v. Thornton*, no written opinion.

Douglas County District Court, Docket 105, Page 263.

Date of Sentence: January 3, 1980.

The defendant entered the victim's apartment through a boarded-up doorway in the basement. His intent was to break and enter for the purpose of burglarizing the home. He took money, drugs, and a radio while the victim was asleep on the sofa. She was awakened by the noise of the defendant. She screamed, and the two struggled. Defendant strangled her with a gag.

**State v. Bussard*, no written opinion.

Red Willow County District Court, No. 11,542.

Date of Sentence: February 22, 1980.

The defendant, defendant's brother, and two friends were shooting pool at a bar. They met the victim at the bar, and the group decided to go for a ride and shoot rabbits. They rode in the victim's car and stopped first at defendant's home to get a gun. They then drove out of town and stopped to shoot at some lights. The defendant told one of his friends that he was going to shoot and rob the victim because the victim was an undercover drug agent. They turned off the road and decided to

shoot at a beer can. Defendant then shot the victim in the nose. When the victim hollered, the defendant fired several more shots into the victim's head from close range. They then took off the victim's clothes and stole his billfold. They dumped the body over a fence and returned to town. They then returned to the scene, where they buried the body and set the car on fire. The defendant was 24 years of age.

State v. McGee, no written opinion.

Sarpy County District Court, Docket 38, Page 170.

Date of Sentence: April 14, 1980.

This defendant, together with several others, was part of a social "family." The defendant was told that if he wanted to get in good with the family he would have to kill the victim, another member of the family, or else he himself would be killed. On the night of the murder a party was held at the home of one of the family members. Most were drinking and took drugs. The victim was given a drink which was drugged. Later, while defendant and two others went upstairs to load a gun, the victim was downstairs with another. The others came down, handed the defendant the gun, and told him to kill the victim, which he did, shooting him 15 or 16 times. The body was thrown in a creekbed in Iowa, where it was found a week later.

State v. Boyer, 211 Neb. 139, 318 N.W.2d 60 (1982).

Date of Sentence: April 14, 1981.

Defendant had an argument with his parents the evening prior to the murder and spent the night sleeping in his car. A neighbor saw him return home in the morning and called defendant's mother, the victim, at work, as the neighbor had been instructed to do by the victim. The defendant was locked out of his home but broke a window to gain entrance. He went upstairs to his bedroom, locked the door, and loaded his shotgun. The victim came home from work and demanded entrance to defendant's bedroom. The defendant opened the door, and the two quarreled. The victim told the defendant to pack his suitcase and leave the house. At that time the defendant retrieved the gun from under his bed and shot her. He then called 911 and told them that his mother had fallen.

State v. Pope, 211 Neb. 425, 318 N.W.2d 883 (1982).

Date of Sentence: June 23, 1981.

The victim and the defendant had been together at a bar. The victim wanted to hire someone to kill his wife, so the two were discussing the transaction. A third party may have been present. They stopped the automobile they were in so they could relieve themselves along a country road. The victim pulled out a large roll of bills, and defendant shot him in the back of the head. The defendant then took the money and dragged the body away to where it was found several days later.

*[m] *State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982).

Date of Sentence: July 16, 1981.

The defendant, 17 years of age, desired to rob someone in order to get money to buy marijuana. The defendant tried unsuccessfully to gain entry into one house. After this failure he obtained a gun from the codefendant, Juan Bradley, and went up to the victim's house. When the victim opened the door, the defendant shot the victim and fled.

*[m] *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982).

Date of Sentence: July 17, 1981.

This is a companion case to *State v. Hubbard*, above. The defendant was 17 years of age.

State v. Scott, 212 Neb. 625, 324 N.W.2d 670 (1982).

Date of Sentence: October 14, 1981.

The defendant and the victim had been living together for approximately 4 years. The victim had two children with the defendant and one more with a previous boyfriend. On the evening of the murder the defendant had gone out with a friend and the victim had gone out with a girlfriend and left the children with a neighbor. When the victim returned at about 10:30 p.m., she found the defendant at the door of her apartment. He was furious with her for leaving the children out past 10 p.m. The victim's girlfriend felt that it was her fault that he was angry and attempted to calm him down. After 20 minutes with him she felt that he had calmed down. At 3 a.m. the next morning the police received a 911 call for a rescue squad. The call was made by the defendant. When the rescue squad arrived, the defendant stated that it was his fault and that he had pushed the victim down the stairs. The apartment was in disarray. There was a coffee table overturned with two legs missing. It was later determined that the body had been beaten

with a leg from the table and with a leather belt, and kicked with steel-toed shoes.

State v. Lamb, 213 Neb. 498, 330 N.W.2d 462 (1983).

Date of Sentence: October 29, 1981.

The defendant shot and killed his wife, who apparently was suffering from many physical ailments.

*[m]*State v. Tucker*, 215 Neb. 636, 340 N.W.2d 376 (1983).

Date of Sentence: July 19, 1982.

Defendant and his brother entered the International House of Pancakes restaurant for the purpose of committing a robbery. The brother asked the waitress/cashier (victim) for change for a dollar. Defendant then pulled his gun and said it was a stickup. The defendant shot the victim once in the upper right chest. The victim was 18 years of age, and the defendant was 21.

*[m]*State v. Tucker*, no written opinion.

Douglas County District Court, Docket 111, Page 465.

Date of Sentence: July 28, 1982.

This is a companion case to *State v. Tucker*, 215 Neb. 636, 340 N.W.2d 376 (1983). The only difference is that, here, the defendant did not actually pull the trigger.

**State v. Blackbonette*, no written opinion.

Lancaster County District Court, Docket 59, Page 108.

Date of Sentence: August 23, 1982.

The defendant knocked on the door of the victim's home. The victim was an elderly woman. The defendant showed her a picture ID and told her he was a police officer. When she then let him in, he tried to make his story believable by checking out the windows, as if observing someone. He told her to go up to her room in case the men broke down the door. He then located a knife and went upstairs. He asked the victim for money. When she said she had none, he stabbed her twice in the stomach. He then strangled her with a cord, which he had apparently cut from some drapery. He then stole her radio, which he later sold for $5. The defendant was 35 years of age.

State v. Searles, 214 Neb. 849, 336 N.W.2d 571 (1983).

Date of Sentence: November 26, 1982.

The defendant was a resident of a state-licensed residential care facility. In this custodial foster home 90 percent of the

residents require medication for psychiatric disorders. The defendant shared an apartment with five others, including the victim. The defendant and the victim had often argued over the use of the TV. On the day of the killing the defendant was told by the proprietor that he was going to have to be moved. The defendant took a knife out of the kitchen, went out to the balcony where the victim was, and stabbed her several times. The defendant admitted the killing, stating, "I stabbed her good; I hope I killed her."

State v. Lynch, 215 Neb. 528, 340 N.W.2d 128 (1983).

Date of Sentence: December 16, 1982.

The victim, a 57-year-old man, was out driving and "looking for some action." He picked up the defendant, age 20, who was a hitchhiker. The defendant explained that he was down on his luck and needed some money. The victim responded to this by saying, "I could get you some money if you will be my friend for a while." The defendant agreed, and the two proceeded back to the victim's apartment. The victim offered the defendant a drink, and the two went into the bedroom. There, the victim disrobed and made homosexual advances toward the defendant. The defendant refused, and the victim persisted. The victim came close to the defendant, and at this point the defendant pulled a pocketknife out and stabbed the victim several times. A struggle ensued, in which the victim was stabbed several more times in the throat area. The cause of death was hemorrhaging from the stab wounds.

State v. Lee, 216 Neb. 63, 341 N.W.2d 600 (1983).

Date of Sentence: January 24, 1983.

The defendant had, on the day on which the murder occurred, driven in from Kansas City with his girlfriend, Bonnie Welker, and Sue Welch. The three were drinking beer and smoking marijuana. That evening the defendant and Welker were using Welker's gun to do some target practice. They later bought additional shells at K-Mart. Just by chance, the defendant and Welker met the victim, Wilbert Swick, and one Gregory Powell at the intersection of 84th and L Streets at approximately 1:20 a.m. Powell was driving Swick's Corvette, and Welker was driving a white Continental, with defendant in the passenger seat. Swick yelled to Welker something like,

"How is it going, baby?" When defendant learned of this he became angry. He made Welker stop the car, got out with the gun, and approached Swick in the Corvette. He told Swick, "Don't be flirting with my girl." He then shot Swick at close range.

*[m]*State v. Nollen*, no written opinion.

Washington County District Court, No. 8982.

Date of Sentence: January 24, 1983.

The defendant, 17 years of age, and a companion broke into a doughnut shop in Blair, Nebraska, for the purpose of robbing it. They encountered the young manager, who was in the process of closing the store. They stole $200 and abducted the victim against her will. They had a knife, and drove around in the victim's car. The defendant sexually assaulted her while they were in the back seat. They tied her hands behind her back. While she was alive in the car, they ran the car off the dock into the river, causing her to drown.

State v. Krimmel, 216 Neb. 825, 346 N.W.2d 396 (1984).

Date of Sentence: April 21, 1983.

The defendant, 20 years of age, did odd jobs for the deceased, who was an elderly (84-year-old) man. On the morning of November 4, 1982, the defendant went to the victim's residence to collect some money for jobs he had done. The victim only had $5 to give him. The defendant became enraged because he felt he was being cheated out of money owed to him. He jumped the victim as the victim was on his way to the bathroom. The defendant put a choke hold on the victim and began stabbing him in the neck and back. The coroner's report indicated 25 stab wounds on the victim.

State v. Meis, 217 Neb. 770, 351 N.W.2d 79 (1984).

Date of Sentence: May 2, 1983.

While inside a local tavern, the defendant made vulgar comments towards the victim's friend. The defendant and the victim stepped outside, where they were involved in a fight. The victim pinned the defendant on a car and then returned to the bar. The defendant subsequently reentered the bar, aiming his revolver at victim's section of the bar. The defendant also harassed others. While the bar owner was telephoning the police, defendant left. The bar was closing, so the victim left

also. The victim died from a single gunshot wound to the front part of his lower chest.

State v. Jones, 217 Neb. 435, 350 N.W.2d 11 (1984).

Date of Sentence: June 13, 1983.

The victim and the defendant had had an ongoing dispute, the defendant maintaining that the victim had fired shots into the defendant's house, nearly hitting a child. Several days later, the defendant entered a north Omaha after-hours club. He saw the victim and asked for an apology. The victim responded by saying it was the defendant that owed him, the victim, the apology. The victim was seated at a table playing cards and the defendant was standing. The victim leaned over the table to gather his money. When the victim went for his pocket to put the money into it, the defendant, fearing that the victim had a gun, shot the victim twice. The victim fell to the floor, but was not yet dead. The defendant went around the table, got on top of the victim, and shot him three more times. The defendant's gun clicked several times after this.

**State v. Rehbein*, no written opinion.

Douglas County District Court, Docket 113, Page 475.

Date of Sentence: June 13, 1983.

The defendant used a penknife to cut the screen and enter victim's apartment in an attempt to perpetrate a robbery. The victim woke up, and the defendant feared being identified. The defendant beat up the victim with his fists and a hatchet. The victim died from multiple stab or cutting wounds to the head, neck, and upper body, as well as multiple lacerations of the scalp and forehead, inflicted by a blunt object.

**State v. Massey*, 218 Neb. 492, 357 N.W.2d 181 (1984).

Date of Sentence: July 8, 1983.

The defendant and an accomplice lured the victim up to a hotel room at the Ramada Inn and robbed him, after hitting him over the head with a vodka bottle. A scuffle ensued, and the victim and Massey ended up in the elevator. After reaching the lobby, Massey shot the victim at close range in the side, and then ran off.

State v. Lopez, no written opinion.

Douglas County District Court, Docket 114, Page 521.

Date of Sentence: August 25, 1983.

One Maxine Wells and the defendant had been drinking at Mitchell's Game Room early on the morning of March 19, 1983. Wells advised the defendant she was going to solicit someone to get some money. The defendant told her that there was a possible customer across the street. She went across the street to a restaurant, where she began talking to the victim as he entered his car. The defendant then came up from behind the victim and beat him on the head with a club.

**State v. Bradford*, 223 Neb. 908, 395 N.W.2d 495 (1986).

Date of Sentence: December 12, 1983.

The defendant and several other individuals robbed the landlord of a house where defendant's sister lived. The robbery was in progress when defendant arrived on the scene. The landlord was stabbed a number of times and then thrown into a trunk of a car and taken out to the country, where he was then thrown into a ditch. He was stabbed again and his throat cut so severely that he was nearly decapitated.

**State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985).

Date of Sentence: January 4, 1984.

The defendant, a prostitute in Omaha, Nebraska, together with three other prostitutes, kidnaped a fifth prostitute who had solicited many "dates" that night. The four decided to rob her instead of trying to rob someone else. The victim was verbally and physically assaulted, including being forced to perform an act of oral sex on one of the prostitutes. The victim was then robbed of $25. Later, she was taken out of the car and beat to death with a stick and a bat.

**State v. Perkins*, 219 Neb. 491, 364 N.W.2d 20 (1985).

Date of Sentence: April 3, 1984.

This is a companion case to *State v. Bradford*, above. This defendant actually instituted the robbery and stabbed the victim a number of times.

State v. Jones, 218 Neb. 713, 358 N.W.2d 765 (1984).

Date of Sentence: April 13, 1984.

The defendant murdered the victim, Ann Speese, and her 12-year-old daughter, Tina. Ann's body was dismembered by a saw or other mechanical means. Ann's death was due to multiple head wounds inflicted by a blunt instrument, and Tina died of asphyxiation. Autopsy reports indicated that Tina may

have been sexually assaulted, but that was not clearly established.

**State v. Crisp*, 219 Neb. 265, 361 N.W.2d 544 (1985).

Date of Sentence: June 6, 1984.

The defendant had escaped while participating in the Douglas County work release program and stole the victim's car so he could leave town. Defendant stated to investigators that he struck her, knocked her out, tore her clothes off, grabbed her by the breast, stuck his hand in her vagina, and tried to "pull her insides out." He admitted stabbing her. He threw her out of the car, and her partially decomposed body was found 1 month later in a field behind an Omaha manufacturing plant. Following the killing, he stole her purse and her car. The defendant was 23 years of age.

**State v. Smith*, 219 Neb. 176, 361 N.W.2d 532 (1985).

Date of Sentence: June 12, 1984.

Loray Smith was one of the participants in the beating death of Laura LaPointe, a prostitute. For fuller details see *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985), and *State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985).

**State v. Ware*, 219 Neb. 594, 365 N.W.2d 418 (1985).

Date of Sentence: June 20, 1984.

The defendant robbed a music store and shot the victim when the victim attempted to phone the police.

State v. Benzel, 220 Neb. 466, 370 N.W.2d 501 (1985).

Date of Sentence: October 29, 1984.

The defendant and another went to the home of the victim to purchase some drugs. Once inside the house, the defendant began to beat up on the party who had accompanied him (a female). The victim told them to leave. The defendant apparently disputed whether or not payment had been made for the drugs and grabbed the victim's girlfriend and put a gun to her head. The victim went to his bedroom for a gun, and when he returned, the defendant shot the victim once in the mouth. He then attempted to shoot the girlfriend by pointing the gun at her from a distance of about 5 feet. He attempted three or four shots, but the gun misfired.

**State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985).

Date of Sentence: November 29, 1984.

This individual was another involved in the beating death of a prostitute. For full details, see *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985).

State v. Haselhuhn, no written opinion.

Lancaster County District Court, Docket 65, Page 96.

Date of Sentence: December 11, 1984.

Clement Rolenc and his former wife, the victim, were involved in a dispute about the provisions in the decree of dissolution of their marriage. Rolenc hired Robin Burchett to kill her. Rolenc and Burchett had met at a truckstop in Lincoln to arrange the murder. The day of the killing, Rolenc took his former wife to breakfast at the truckstop. There, the couple met Burchett and a third party, who was unknown to the couple. This was the defendant. Rolenc and the victim drove to the country in a car followed by Burchett and the defendant, who were in Burchett's car. The two cars stopped, and the defendant, who in turn had been hired by Burchett to actually perform the killing, transferred cars. Sitting in the back seat behind the victim while the victim's husband drove the car, the defendant slipped a belt around the victim's neck and choked her to death. Burchett and the defendant then carried the victim's body into the trunk of Burchett's car. Rolenc removed the victim's ring and took her purse. Rolenc paid Burchett for doing the job, and drove off. Burchett and defendant drove to a creek, where they tied the hands and feet of the body, attached three large pieces of concrete to it, and allowed it to sink into the water.

State v. Norfolk, 221 Neb. 810, 381 N.W.2d 120 (1986).

Date of Sentence: December 19, 1984.

The defendant went to his aunt's home, where he obtained a butcher knife. After removing his clothing he went to his aunt's bedroom and stabbed her three or four times. He then placed his arm around her neck and squeezed until she died. After that he attempted to have intercourse with her dead body.

State v. Burchett, 224 Neb. 444, 399 N.W.2d 258 (1986).

Date of Sentence: January 2, 1985.

This is a companion case to *State v. Haselhuhn*, above. Burchett was hired by Clement Rolenc to kill Rolenc's former wife. Burchett in turn hired Wayne Haselhuhn to actually do

the killing. After the woman was strangled by Haselhuhn, Burchett and Haselhuhn removed her body from the car and drove to a creek, where they then weighed the body down and threw it into the creek.

**State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986).

Date of Sentence: June 17, 1985.

The defendant forcibly entered the victim's home. The victim, an elderly lady, was apparently lying on the kitchen floor, trying to use the phone to call for help. The defendant grabbed the phone and ripped it from the wall. The defendant then ransacked the house, going through closets and drawers. The victim was discovered the next day, lying dead on the floor. It was extremely cold in the house, and death was apparently due to exposure to cold caused by the breaking of a window to gain access.

State v. Hunt, 220 Neb. 707, 371 N.W.2d 708 (1985).

Date of Sentence: October 11, 1985.

The defendant knocked on the victim's door and, when the victim opened the door, forced his way in at gunpoint. He then told her to lie on the floor, and she complied. He tied her arms and legs and stuffed panties in her mouth. He took a nylon stocking and strangled her to death, then untied her, removed her clothing, and masturbated over her body. Believing that she still had a pulse, although, in fact, she was dead, he carried the body to a bathtub, where he placed the body in the water. The phone rang, and he then fled the premises, later having his wife call the police and report the murder.

**State v. Domingus*, appeal pending.

Lincoln County District Court, Docket 92, Page 31.

Date of Sentence: November 10, 1986.

The defendant was convicted of killing a 35-year-old female, who died of massive head injuries after she was beaten with a board. The medical testimony indicated that the victim was alive when much of the beating was inflicted. Much of her head and skull were damaged.

III. SECOND DEGREE MURDER CONVICTIONS—LIFE SENTENCE IMPOSED.

State v. Deckard, no written opinion.

Douglas County District Court, Docket 87, Page 382.

Date of Sentence: April 25, 1974.

Defendant maintains that he was with a friend who took him over to the victim's house. The friend and the victim were having an argument over money and drugs, and defendant pulled out his gun and ordered the victim to stop fighting. The victim bumped into the gun, and it discharged accidentally. Death was caused by a bullet wound to the temple.

State v. Goldsberry, no written opinion.

Lancaster County District Court, Docket 39, Page 219.

Date of Sentence: October 7, 1974.

The defendant was 18 years old at the time of the crime. On the morning of November 11, 1973, he observed the victim walking by his home on her way to school. He misrepresented to her that he had mail in his home belonging to her. Once she entered the house, she realized he was attempting to hold her there, and sought to leave. He did not let her go, and she began to scream. Defendant pushed her back as the victim resisted. He then used both hands to choke her. She fell to the ground and was rendered unconscious shortly thereafter. He described her face as being blue and her mouth as foamy. Defendant wrapped the body in a blanket and put a green trash bag over the body. He then placed the body in a station wagon and took it to a pasture near Table Rock, Nebraska. There, the body was undressed and the clothes put in the trash bag. He returned home and threw away the clothes, along with her purse and book. The body apparently was ravaged by coyotes, and the skull was found several months later. The bones of the body were scattered throughout a pasture, apparently by the coyotes.

**State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974).

Date of Sentence: December 20, 1974.

The defendant, though only 15 years of age, was married with a child. He had been drinking all day with friends and decided to use a public phone to call his wife. He changed his mind and decided to use a phone in a home. After walking several blocks he went into a home and began looking around to see if there was anything he could steal. He grabbed a knife from the kitchen for protection in case someone was home. The victim, a 2½-year-old boy, woke up and made a noise.

Defendant tried to cover the victim's mouth with his hand and finally stabbed him twice in the chest to prevent him from getting out of bed.

State v. Taylor, no written opinion.

Douglas County District Court, Docket 91, Page 592.

Date of Sentence: June 16, 1975.

Defendant picked up a hitchhiker at 31st and Dodge Streets in Omaha, Nebraska. After arriving at the victim's home, defendant removed a sawed-off rifle from his waistband in his coat, took the safety off, and placed it against the victim's left temple area and pulled the trigger just as the victim was about to leave the car. Defendant drove around for a while with the body in the car. He then stopped, pushed the body out of the car, searched all the pockets, to make it look like a robbery, and shot the victim one more time in the back of the head.

State v. Braasch, no written opinion.

Adams County District Court, Docket 61, Page 285.

Date of Sentence: August 15, 1975.

The victim in this case was the defendant's supervisor in Hastings, Nebraska. Defendant had worked for the company for the past 6 1/2 years and received much of his early education and training from the victim. The defendant had hard feelings towards the victim for several years because the defendant felt he was not getting credit for the work he did.

State v. Walker, 197 Neb. 314, 248 N.W.2d 759 (1976).

Date of Sentence: March 24, 1976.

Defendant and his wife, the victim, were separated. Defendant intercepted her as she was leaving her place of employment in an automobile operated by her brother. Apparently, a fight developed between defendant and his brother-in-law, during which time a gun of the defendant's discharged, striking and killing the victim. Defendant maintained that he was not aware that the victim had been shot until the next morning, when he turned himself in to authorities.

State v. Hoppes, 202 Neb. 383, 275 N.W.2d 608 (1979).

Date of Sentence: June 3, 1976.

Defendant's wife had recently moved out after an extended period of quarreling with defendant. On the evening of the

murder the defendant consumed a bottle of wine and then purchased a second bottle, which he took to his wife. She accepted the bottle and let him into her residence. The two began to argue about getting back together, and a verbal argument turned into a physical battle. Defendant claims that he swung at his wife, aiming for her face, but missed and hit her in the neck. He states that she flew backwards and hit the wall, fell, and eventually died. Defendant maintains that he attempted to call for an ambulance, but when he discovered the phone was not working, he placed his wife's body in his van and went home. The next day, after driving for some time, he decided to dispose of the body. He cut a hole in some ice, tied a wheel to the body with a log chain, and dumped the body into the lake. The autopsy disclosed that the wife died of strangulation and not by reason of a blow to the neck.

State v. Cole, no written opinion.

Otoe County District Court, Docket 27, Page 68.

Date of Sentence: August 3, 1976.

The defendant entered the home of the victim and fatally stabbed her with a hunting knife. He also stabbed the victim's 11-year-old daughter. There was evidence that after stabbing the victim the defendant sexually assaulted her. She was stabbed once in the throat and twice in the chest. It was the wounds to the chest which caused her death. The defendant then carried the victim's body over his shoulder to the rear door, where he dropped it and left.

State v. Robinson, 198 Neb. 785, 255 N.W.2d 835 (1977).

Date of Sentence: August 27, 1976.

The defendant and the victim were close friends. On the day of the murder the defendant took the victim, his girlfriend, and her children from Omaha to Lincoln in his automobile. The defendant had a $50-per-day heroin habit, which he supported by stealing checks out of mailboxes. Later in the evening, the victim requested the defendant to return him, his girlfriend, and her children to Omaha. The defendant refused to do so, though, on several occasions, he promised he would. The two ultimately got into a fight, and the victim approached the defendant. Defendant warned the victim to get back, then pulled the gun out and shot the victim in the head.

State v. Scott, no written opinion.

Cass County District Court, No. C-7 52.

Date of Sentence: September 7, 1976.

Defendant was living with his girlfriend. The victim was also a friend of theirs, who was romantically inclined toward the defendant's girlfriend. On the night of the incident the defendant had a gun and had consumed much alcohol. The girlfriend and her children were staying in the victim's trailer. Defendant suspected she was there, and he wanted to get her and bring her home. He went to the door, and the victim answered. The victim shoved the defendant away and said the girlfriend would come home when the victim brought her home. The victim returned to bed and told the girlfriend that he was not going to let the defendant in at that time of the night. The girlfriend got up and was going out to talk to the defendant, when she heard a shot. She walked out of the bedroom into the hallway to find the defendant, who had sneaked into the trailer without anyone's knowledge and who then shot the victim.

State v. Thompson, 199 Neb. 67, 255 N.W.2d 880 (1977).

Date of Sentence: December 10, 1976.

Defendant went to a party at his sister's home. During the evening, an argument developed and a fight broke out. One of the guests threatened the defendant, saying he would kill the defendant the next time he saw him. The next day, the defendant, after drinking alcohol and smoking marijuana, purchased a rifle and ammunition. He then went over to his sister's house to talk to her about what had happened the night before. He walked in with a loaded gun and pointed it at her and several other persons. The victim, a longtime friend of the defendant, was in the house. The victim pushed or knocked defendant against the wall in an effort to disarm him. There was a brief conversation between the two, and, as the victim began to walk away, defendant shot him. The bullet entered in the chest near the right shoulder.

State v. Bogan, no written opinion.

Lancaster County District Court, Docket 47, Page 7.

Date of Sentence: March 11, 1977.

The defendant was in the lounge of a hotel, drinking with

friends. The victim, a friend of the bartender, was advised that the defendant owed the bar some money. The victim confronted the defendant about it, and the defendant became angry, pulled out his gun, and shot the victim in the head. A witness to the shooting stated that the victim did not strike the defendant and was unarmed.

**State v. Womack*, no written opinion.

Keith County District Court, No. 6860.

Date of Sentence: December 16, 1977.

The defendant and two codefendants were on their way to Montana to live in the mountains. They had stolen guns in Texas and were involved in a series of robberies along the way. They pulled off at a truckstop, with plans to rob a trucker. One of the codefendants knocked on the driver's door, and the victim, who was sleeping inside the truck, raised up from the sleeper. The defendant shot once through the windshield and once through the driver's window. The defendant was approximately 10 feet away. They then took the victim's billfold and a CB radio.

**State v. Fort*, no written opinion.

Douglas County District Court, Docket 100, Page 423.

Date of Sentence: January 12, 1978.

The account of the murder comes from the defendant. He maintains that he met the victim approximately 10 days before the homicide. On the night in question they drove to Carter Lake, Iowa, for the purpose of smoking marijuana. While at the lake, defendant maintains, the victim suggested that they engage in homosexual activity. The defendant refused, but the victim continued to make advances. At that point the defendant removed a pistol he carried in a shoulder holster and shot the victim three times in the head. He then disposed of the body by burying it in a shallow grave near Glenwood, Missouri, and stole the victim's credit cards, which he then proceeded to use.

State v. Price, 202 Neb. 308, 275 N.W.2d 82 (1979).

Date of Sentence: March 20, 1978.

The victim, an infant, was pronounced dead on arrival at a hospital. She had sustained numerous injuries about her body, and the only fresh wound was a large bump on the back of her head, along with some blood coming from her left ear. The

defendant, who was living with the child's mother, was the only one with the baby at the time she allegedly fell down the stairs.

State v. Sell, 202 Neb. 840, 277 N.W.2d 256 (1979).

Date of Sentence: May 26, 1978.

Defendant admitted that he first hit the victim and then took her out to the country, where he killed her. He inflicted two deep puncture wounds, one in the neck and one in the right side of the chest. There were also 15 to 20 small cuts around the neck and many bruises in the vaginal area.

State v. Barnett, 204 Neb. 655, 284 N.W.2d 573 (1979).

Date of Sentence: February 13, 1979.

The defendant had been married to the victim for about 2½ years. During the course of this marriage, the defendant discovered that his wife had worked as a prostitute. On the evening before the murder the defendant and his wife had consumed large amounts of beer. In the late evening and early morning, they began to argue about various things, ranging from the defendant's past involvement in the military to the fact that he did not have a job. The defendant attempted to vent his anger by throwing a flowerpot. The next thing the defendant could recall was standing by a window with a gun in his hand. He had shot his wife 15 times with his .22-caliber rifle, which held 15 rounds. He attempted to revive her, but he could not because she was obviously dead. He called 911 and informed them that he had shot his wife.

State v. Myers, 205 Neb. 867, 290 N.W.2d 660 (1980).

Date of Sentence: June 5, 1979.

The defendant killed his father by shooting him in the head while in their home. Defendant maintained that he shot his father because his father was an alcoholic.

**State v. Thornton*, no written opinion.

Douglas County District Court, Docket 105, Page 265.

Date of Sentence: February 1, 1980.

This is apparently a companion case to *State v. Thornton*, Douglas County District Court, Docket 105, Page 263. The first case involved a life sentence for felony murder, while this one was a life sentence for second degree murder.

State v. Wredt, 208 Neb. 184, 302 N.W.2d 701 (1981).

Date of Sentence: May 28, 1980.

The defendant, along with his stepmother, planned to kill his father. The defendant had discussed with his stepmother who would get the insurance money and the personal property of the deceased. The plan was to make the shooting look like an accident. The defendant took his father's .45-caliber revolver and waited for him to come home. When the victim arrived, the defendant shot him once, causing the victim's death.

State v. Branch, 209 Neb. 279, 307 N.W.2d 512 (1981).

Date of Sentence: June 27, 1980.

The defendant and the victim had lived together for 3 years. They were arguing about credit cards and had a fight. The victim was going to hit the defendant with her shoe while the defendant was lying on the bed. Defendant reached up and grabbed her by the neck with his hand to hold her off. He held her against the wall and she choked to death.

*[m]*State v. Moore*, 209 Neb. 88, 306 N.W.2d 183 (1981).

Date of Sentence: August 15, 1980.

Defendant was a codefendant in the case of *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), and participated in the robbery and murder of an Omaha cabdriver. Defendant was 14 years old at the time.

State v. Hardin, 212 Neb. 774, 326 N.W.2d 38 (1982).

Date of Sentence: June 5, 1981.

Defendant and victim were husband and wife and had been separated for several months. On the evening in question defendant went to his wife's home, ostensibly to obtain some clothing which was stored there. The parties had an argument. The defendant walked back to where his car was parked, got in, and drove the car through the house, aiming at what would be the victim's bedroom. The defendant then emerged from the car, uninjured, withdrew his weapon, and fired five times. His wife later died from four bullet wounds received from the shooting.

**State v. Randall*, no written opinion.

Saunders County District Court, No. 1845.

Date of Sentence: December 10, 1981.

The defendant and two friends were hitchhiking. They obtained a ride from the victim. They later went into a bar with the victim, where they drank. They next went to the home of a

friend of the victim. At the end of the night the victim was giving the three a ride home when one of them asked him to pull over so he could relieve himself. This was part of a scheme to rob the victim. The victim stopped the car and literally fell out of the car because he was so intoxicated. One of the three punched him and kicked him until the victim was unconscious. His unconscious body was then put in the trunk of the car. Defendant drove and dropped one of the others off. The defendant and the remaining friend then proceeded to a place west of the Elkhorn River. They got out and heard the victim pounding on the trunk. The defendant hit him with his fists and then struck him over the head with a metal bar. They then robbed him, took his clothes, and threw him over the edge into a ditch creek. The victim was found dead either of asphyxia from drowning or of massive head injuries.

*_State v. Davis_, no written opinion.

Saunders County District Court, No. 1846.

Date of Sentence: December 10, 1981.

This is a companion case to _State v. Randall_, and the facts are identical. John Davis was the other party involved in the murder.

State v. Isherwood, 213 Neb. 592, 330 N.W.2d 495 (1983).

Date of Sentence: April 23, 1982.

The defendant, then age 18, was living with a man and his 4-year-old son. Defendant was in charge of caring for the 4-year-old while the father was away at work. On the day in question she had given the child a shower and dressed him in pajamas for an afternoon nap. When the defendant later checked on the boy, he was playing with the window air-conditioner instead of sleeping. Defendant spanked the boy five or six times, whereupon the boy told her he hated her and his father. Defendant proceeded to beat the boy brutally, and then strangled him with either her hands or a television cord, or both.

State v. Hunt, 214 Neb. 214, 333 N.W.2d 405 (1983).

Date of Sentence: August 16, 1982.

On March 23, 1982, the defendant flew to Kansas City, Missouri, where he planned to steal an automobile and drive it to a "chop shop" in Waukegan, Illinois, where he intended to

sell it for $10,000. Upon arriving in Kansas City the defendant, over the next several days, staked out cars. On the 25th of March he abducted a cabdriver at knife-point from the Kansas City airport. The defendant ordered the cabdriver to pick up a hitchhiker, and the three of them proceeded on I-29, eventually ending up near Nebraska City, Nebraska. Defendant then stabbed the cabdriver in the back. The cabdriver fell down an embankment and began running across a creekbed. The defendant chased him, and they engaged in a struggle for the knife. The defendant then proceeded to stab the cabdriver 14 more times and slashed his throat 5 times. During all of this time, the cabdriver pleaded for his life.

State v. Clark, no written opinion.

Douglas County District Court, Docket 114, Page 465.

Date of Sentence: September 16, 1983.

The defendant and his brother, a codefendant, were entering a local bar. The brother noticed keys in the ignition of a truck. The brother got into the truck and began backing the truck out, when he hit another vehicle. The brother then left the scene. The victim, a part owner of the truck, learned that defendant's brother was responsible for the damage. The owner of the truck then went to the Clark home to discuss the matter. As the owner was about to leave, he attempted to shake hands with the brother, who responded by beating and kicking the owner of the vehicle. The defendant then joined in. The victim was apparently beaten into unconsciousness and his body placed in a trash dumpster, where he died of injuries sustained from the beating.

State v. Clark, no written opinion.

Douglas County District Court, Docket 114, Page 464.

Date of Sentence: September 16, 1983.

The facts of this companion case are identical to the facts in the preceding case of *State v. Clark*.

State v. Crawford, no written opinion.

Douglas County District Court, Docket 114, Page 837.

Date of Sentence: January 6, 1984.

The defendant and the victim had had a number of altercations because the victim had sexually assaulted the defendant's 17-year-old sister. On the day of the murder both

the defendant and the victim were at a large, annual gathering at Carter Lake, Iowa. There were between 4,000 and 7,000 at the park. The occasion was the Fourth of July. The defendant and the victim had a chance encounter. The two had some words, and the defendant pulled his gun out and shot the victim once in the chest and once in the leg. The victim died of the wounds.

**State v. Honeycutt*, no written opinion.

Otoe County District Court, Docket 31, Page 153.

Date of Sentence: April 24, 1984.

Although the defendant pleaded guilty to second degree murder, he refused to give any statement concerning how the murder occurred. Further investigation disclosed, however, that the defendant and the victim were friends. Apparently, the defendant needed money and beat the victim to death by hitting him a number of times in the face with a brick. When apprehended, the defendant was in possession of the victim's car and television. The body of the victim was beaten beyond recognition.

State v. Harrington, no written opinion.

Lancaster County District Court, Docket 65, Page 170.

Date of Sentence: August 10, 1984.

The defendant and the victim were in a car driven by a friend of the defendant. The car was pulled over to the side of the road, and the defendant and the victim got out of the car. The driver observed the defendant hit the victim with a baseball bat and saw blood splatter on the windows of the car. Defendant returned to the car with bloodstains on his person. He then pushed the body down the hill toward a creek.

State v. Rolenc, no written opinion.

Lancaster County District Court, Docket 64, Page 263.

Date of Sentence: January 9, 1985.

The defendant and his former wife, the victim, were involved in a dispute about the provisions in the decree of dissolution of their marriage. The defendant met with Robin Burchett and arranged to have him kill his former wife. The day of the murder, the defendant took his former wife to breakfast at a truckstop. There, the couple met Burchett and Wayne Haselhuhn, who was unknown to either defendant or the

victim. Defendant and the victim drove to the country in a car followed by the killers, who were in a second car. At a particular point the car stopped and one of the killers transferred into the back seat of the defendant's car behind the victim. He slipped a belt around her neck and choked her to death. The defendant then removed the victim's ring and took her purse. The two killers put her body in the trunk of their car, drove to a creek, and, after attaching three large pieces of concrete to the body, allowed it to sink into the water.

State v. Moss, no written opinion.

Hall County District Court, Docket 32, Page 37.

Date of Sentence: March 13, 1985.

The defendant, a 67-year-old man, shot and killed his grown son. He and his son had been having a disagreement for some time over a number of matters, including a matter involving defendant's wife, not the victim's mother. The defendant fired four shots into his son's head as his son lay sleeping in a trailer.

State v. Eggers, 220 Neb. 862, 374 N.W.2d 36 (1985).

Date of Sentence: December 21, 1985.

Defendant severely beat a minor child of his girlfriend, causing her death. He attempted to revive her and could not. When he realized she was dead, he panicked and attempted to make the death look like an accident by placing the body in a bathtub and then calling 911.

**State v. Suffredini*, 224 Neb. 220, 397 N.W.2d 51 (1986).

Date of Sentence: June 30, 1986.

The defendant robbed and murdered a man outside the door of the men's restroom at the rest area along Interstate 80 in Lincoln County, Nebraska. The victim was shot five times with a .22-caliber pistol. Between $180 and $240 was taken from him by the defendant.

IV. SECOND DEGREE MURDER CONVICTIONS—TERM OF YEARS.

State v. Taylor, no written opinion.

Lincoln County District Court, Docket 68, Page 23.

Date of Sentence: March 21, 1974.

Sentence: 20 years.

The defendant, who had been drinking most of the day, sold his bike to buy gun shells with the intention of committing suicide. He returned home and engaged in an argument with his wife, the victim. She had hidden his gun at a neighbor's house. They both went over and retrieved the gun. Upon returning home and discussing the fact that the victim had filed for divorce, defendant shot her and then shot himself in the mouth. The bullet passed through his upper lip and only wounded him.

State v. Hampton, no written opinion.

Douglas County District Court, Docket 88, Page 179.

Date of Sentence: April 1, 1974.

Sentence: 10 to 20 years.

The only evidence in the case comes from the defendant himself. According to the story he tells, he was invited into the victim's home when he asked to use the phone. Once in the house, he maintains that the victim, a female, for no apparent reason shot once at him. He charged her with a knife and stabbed her three times. After she fell he ransacked the house.

State v. Bautista, 193 Neb. 476, 227 N.W.2d 835 (1975).

Date of Sentence: July 23, 1974.

Sentence: 20 years.

Defendant and the victim's son engaged in a fight outside a bar. After the minor disturbance the defendant left the bar to take his nephew home. He then returned to the bar some 10 to 25 minutes later, carrying a rifle. He went over to the table of the victim and asked where the victim's son was, saying, "Look what he did to me," and pointing to his face. He then said to the victim, "How would you like it if I got you here and now?" or words to that effect. The victim began to get up from his chair, and defendant shot him in the heart.

State v. Barajas, 195 Neb. 502, 238 N.W.2d 913 (1976).

Date of Sentence: August 13, 1975.

Sentence: 25 years.

The defendant and his girlfriend were at a bar when they met the victim. The victim was interested in the defendant's .22-caliber pistol, and the three went to try it out at a target practice site. At the victim's request they left the bar in defendant's car. On the way the victim made several advances toward defendant's girlfriend, putting his arms around her and

brushing her leg with his hand. She told defendant, who became angry, stopped the car, and ordered the victim to get out. Outside the car, an argument ensued that developed into a fight. Defendant shot and wounded the victim, and then killed him with two shots to the left cheek. Defendant then fled to Mexico, where he was later arrested and returned for trial.

State v. Shonka, no written opinion.

Butler County District Court, Docket 26, Page 36.

Date of Sentence: February 5, 1976.

Sentence: 10 years.

The defendant, a 33-year-old female, was married to the victim, age 63. On October 31, 1975, the defendant took her husband to Columbus, Nebraska, to work, and then went to a bar to drink. Later that evening, she went to Surprise, Nebraska, to continue drinking. Upon leaving the bar she pulled out a gun and waved it around. She felt she was being pushed around. She then apparently went back to her trailer home in Rising City, Nebraska, and shot her husband. While she does not recall the episode, she was found in the trailer with a gun. The body of her husband was found outside the trailer. Several witnesses stated that she said she should have shot the victim between the eyes.

State v. Pigue, no written opinion.

Douglas County District Court, Docket 94, Page 378.

Date of Sentence: July 28, 1976.

Sentence: 10 years.

The defendant returned home from work on February 13, 1976, and found that her husband (the victim) had left with her car. The victim did not return until February 18. He apparently also lived with another woman. There had been difficulties between them for several years. Prior to the 18th, the defendant had purchased a gun, and when the victim attempted to enter the house on that date, the defendant told him she would kill him if he came in, fearing that he would beat her up. When the victim entered the house, the defendant shot him three times.

State v. Yarbrough, 199 Neb. 41, 255 N.W.2d 874 (1977).

Date of Sentence: September 28, 1976.

Sentence: 50 years.

The defendant went to Fairbury, Nebraska, with several

friends. Once in Fairbury, they stopped at the victim's residence and had her join them. The entire group then went to a beer party at a local tavern in Fairbury. At around midnight the defendant had an argument with one of the members of the group and was taken back to the victim's residence. The victim then took the defendant to a local hotel. The two of them lay down on a bed, and the defendant strangled the victim. After killing her he then had sexual intercourse with her body. The defendant fell asleep and then, when he awoke in the morning, had intercourse again with the victim's body. When he saw blood around her face, he became scared and hitchhiked back to Lincoln, Nebraska. The victim was later discovered by the hotel employees.

State v. Victor, no written opinion.

Douglas County District Court, Docket 95, Page 308.

Date of Sentence: November 15, 1976.

Sentence: 20 years.

The defendant and the victim were friends and next-door neighbors. Defendant maintains that he was invited into the victim's home and asked to engage in sexual intercourse with her. When he refused, she asked whether he knew where she could get some marijuana. He again replied in the negative. At this point the defendant maintains the victim grabbed his arm and he stabbed her as he was attempting to get away.

State v. Denney, no written opinion.

Knox County District Court, Docket 33, Page 58.

Date of Sentence: April 7, 1977.

Sentence: 15 years.

The defendant and some friends had been drinking all day. The defendant and the victim got into a fight about Indian culture. The victim had a gun and threatened defendant. The defendant then went upstairs and got a gun, came back down, and, as the victim stood up and began to move toward the defendant, the defendant shot him once in the abdomen.

State v. Johnson, 200 Neb. 760, 266 N.W.2d 193 (1978).

Date of Sentence: June 30, 1977.

Sentence: 20 years.

The defendant and a friend spent several hours drinking beer and driving around York, Nebraska. They encountered

defendant's younger sister and her friends and offered them a ride home. In the car on the way home, the defendant offered alcohol to one of the minor girls. Once home, the defendant's mother reprimanded him for offering alcohol to a juvenile. An argument followed, in which both parties slapped each other in the face. Defendant's mother reported the matter to his brother, who notified the police after hearing shots while on the phone talking to his mother. Defendant had grabbed a gun, ran outside toward a local church, and fired five shots through the living room window. Defendant's mother phoned the police after defendant was seen by her to be in the area of the church. The victim, a police officer, went to the church parking lot across the street. Shortly after he stepped out of his car, the defendant shot him once in the chest, causing his death.

**State v. Brick*, no written opinion.

Cheyenne County District Court, No. 9179.

Date of Sentence: September 20, 1977.

Sentence: 40 years.

This is a companion case to *State v. Simpson,* 200 Neb. 823, 265 N.W.2d 681 (1978), in which a life sentence for first degree murder was imposed. The defendant, her child, and her brother decided to hitchhike to California because they had no money. They got a ride with a trucker, who gave them $20. In addition, they stole a gun belonging to the trucker. The three then got another ride, this time with the victim, who offered to take them all the way to California. Along the way, the defendant and her brother determined to rob the victim and take his car. On a signal from her brother, the defendant pulled out the gun they had stolen and placed it against the victim's head. She ordered him to stop, but he resisted. She shot him in the back of the head twice, which caused the victim to be paralyzed but not dead. The defendant and her brother then pulled the body into a borrow pit off of Interstate 80 near Kimball, Nebraska. The defendant's brother shot the victim two more times, and then the two left for California.

State v. Hander, no written opinion.

Cedar County District Court, No. 6528.

Date of Sentence: November 17, 1977.

Sentence: 15 years.

Defendant and his wife separated, and a mutual friend of the parties moved in with the wife. Defendant became angry and ordered him out. The two scuffled, and defendant said to the victim that if the victim did not move out he, the defendant, would kill him. Later, the defendant saw his wife with the victim and became angry. He obtained a .22-caliber rifle and followed the victim. When the victim parked his automobile and got out of the car, the defendant shot and killed him. Defendant maintained he thought the victim was going for a weapon.

**State v. Forster*, no written opinion.

Platte County District Court, No. 2820.

Date of Sentence: December 8, 1977.

Sentence: 35 years.

This is a companion case to *State v. Roewert,* Platte County District Court, No. 2805, in which a life sentence for first degree murder was imposed. The defendant and some friends were drinking at a bar in Norfolk, Nebraska, and planned to rob and kill the victim. They determined they would kill the victim so as not to be identified. The victim was lured out of the bar by inviting him to a party. They drove him out to a country road, where they took his billfold. While the victim was passed out from being intoxicated, Roewert cut his throat and then decapitated him. He then disemboweled the body, rolled it over, and cut it about the back. The defendant willingly participated in the robbery and later disposed of the wallet in a trash receptacle.

**State v. Brown*, 201 Neb. 536, 270 N.W.2d 318 (1978).

Platte County District Court, No. 3839.

Date of Sentence: December 9, 1977.

Sentence: 35 years.

The individual here was involved in the same case as *State v. Roewert* and *State v. Forster.*

**State v. Denman*, no written opinion.

Keith County District Court, No. 6886.

Date of Sentence: February 10, 1978.

Sentence: 25 years.

This is the same fact situation as is involved in *State v. Womack*, Keith County District Court, No. 6860, in which a life sentence for second degree murder was imposed.

State v. Stofer, no written opinion.
Saline County District Court, No. 1058.
Date of Sentence: March 6, 1978.
Sentence: 40 years.

The defendant, who had been drinking, returned home, picked up a gun, and shot and killed his mother while she was in bed sleeping.

**State v. Epp*, no written opinion.
Gage County District Court, No. J-70.
Date of Sentence: June 8, 1978.
Sentence: 50 years.

The victim, who owned a liquor store and lived close to it, one night heard his security alarm go off. He took a shotgun and went to investigate. Defendant was there and had gone up to the door of the liquor store to rob it, but the door was locked. Defendant shot the victim once, after the victim inquired what the defendant was doing there and told defendant to leave. After the shooting the defendant drove away in his car.

State v. Coleman, no written opinion.
Douglas County District Court, Docket 102, Page 250.
Date of Sentence: July 25, 1978.
Sentence: 20 years.

The defendant and the victim argued over some money that the defendant owed the victim. The victim then went to a phone in the tavern where the argument took place and, when he returned, told the defendant that he had called for help. Defendant had had trouble with the individuals the victim had called, so he left. He later went over to the victim's home to talk it over. He took his nephew with him. They had a 12-gauge shotgun and a .38-caliber revolver. When the defendant confronted the victim, a second argument ensued, and, subsequently, the shotgun went off, killing the victim.

State v. Marteney, 210 Neb. 172, 313 N.W.2d 449 (1981).
Date of Sentence: March 23, 1979.
Sentence: 12 years.

The victim entered a local bar in DuBois, Nebraska, and went behind the bar to get a glass of water. Shortly after the victim entered the bar, the defendant entered, carrying a rifle. The defendant walked near to where the victim was standing

and mentioned something about leaving his daughter-in-law alone. Apparently, the defendant believed that the victim was having an affair with his daughter-in-law. He then raised the rifle and shot the victim in the chest.

State v. Samuels, 205 Neb. 585, 289 N.W.2d 183 (1980).

Date of Sentence: April 5, 1979.

Sentence: 13 years.

According to the statement given by the defendant, the victim had taken money from the defendant's friend. The defendant went to see the victim, and the victim pulled a gun on the defendant. Defendant was alongside the victim's car when he shot the victim three times, and then ran from the scene because he was scared.

State v. Morris, no written opinion.

Douglas County District Court, Docket 106, Page 203.

Date of Sentence: January 9, 1980.

Sentence: 20 years.

The defendant, who had been drinking heavily and who had just lost his job of 22 years as a baker, shot and killed his second wife, who had filed for divorce.

State v. Paulson, 211 Neb. 711, 320 N.W.2d 115 (1982).

Date of Sentence: June 3, 1980.

Sentence: 15 years.

The defendant and several others were members of a social "family." A codefendant was told that if he wanted to get in good with the family he would have to kill the victim, another member of the family, or he would be killed. Defendant was apparently one of the organizers of the plan. On the night of the murder a party was held at the home of one of the family members. Upon signal the codefendant shot the victim. The body was thrown into a creekbed in Iowa, where it was found a week later.

State v. Stranghoener, 208 Neb. 598, 304 N.W.2d 679 (1981).

Date of Sentence: June 3, 1980.

Sentence: 20 years.

This is a companion case to *State v. Paulson*, 211 Neb. 711, 320 N.W.2d 115 (1982). Defendant here was a member of the "family" and one of the organizers of the murder.

State v. Green, no written opinion.

Buffalo County District Court, No. 6177.

Date of Sentence: July 25, 1980.

Sentence: 25 years.

The defendant and his wife, the victim, were separated. After the wife filed for a divorce, the couple attempted several counseling sessions, which failed. On the day of the crime the defendant visited his wife at their home to discuss the payment of certain bills. Defendant asked to use the bathroom. He came out of the bathroom, went to the kitchen, got a drink of water at the sink, and shot his wife three times.

State v. Herren, no written opinion.

Scotts Bluff County District Court, No. 28207.

Date of Sentence: September 26, 1980.

Sentence: 35 years.

The defendant, after drinking heavily and using cocaine, LSD, and barbiturates, attacked his girlfriend and stabbed her a number of times. She lived only by feigning death. Upon leaving the girlfriend's apartment defendant went to the home of an alcohol and drug detoxification program leader who had been involved in aiding the defendant. The leader was killed by reason of multiple stab wounds inflicted by the defendant, including several after death.

State v. Jackson, no written opinion.

Douglas County District Court, Docket 107, Page 500.

Date of Sentence: November 21, 1980.

Sentence: 25 years.

Defendant and the victim were involved in an altercation on a public street, each being in his respective automobile. The victim refused to yield the right-of-way to the defendant, and also delivered racial remarks. At a stop light the victim got out of his car and walked over to the defendant's car. The defendant got his gun from under his seat and shot the victim three times.

State v. Payne, no written opinion.

Dodge County District Court, Docket 71, Page 169.

Date of Sentence: November 24, 1980.

Sentence: 17 years.

The defendant and the victim lived in the same trailer park. The victim was a drug dealer. There were apparent ill feelings between the two. The defendant took a record book of drug

sales and some money from the victim's trailer and may have been returning them when the murder occurred.

State v. Stocker, no written opinion.

Douglas County District Court, Docket 109, Page 62.

Date of Sentence: February 27, 1981.

Sentence: 12 years.

The victim in this case was a neighbor of the defendant. He was an auto mechanic and towed junk cars to the street in front of both homes. The victim then worked on the cars, often into the late hours of the evening. Friction arose between the defendant and the victim over the cars that were left on the street. Defendant made repeated calls to the Omaha Police Department, but the situation went on unresolved. On the day in question the defendant, who had been drinking at a bar, came home to find the victim outside working on a car. It was late, so the defendant asked the victim to shut off the lights and cease working. The victim responded with vulgar language and continued working. Defendant retrieved his gun from his house and pulled the trigger twice, but there was no discharge. He injected another shell and shot the victim once from a distance of 15 to 20 feet.

State v. Kemp, no written opinion.

Douglas County District Court, Docket 109, Page 441.

Date of Sentence: September 29, 1981.

Sentence: 25 years.

On February 22, 1981, the Omaha Police Department received a call from defendant, at which time defendant advised the police that he had shot his girlfriend. The police were directed to the scene and found the victim shot three times in the head with a .22-caliber pistol. She died the following day.

State v. Brown, 213 Neb. 68, 327 N.W.2d 107 (1982).

Date of Sentence: December 14, 1981.

Sentence: 25 years.

Defendant maintained that he and the victim had an argument and that the victim pulled out a knife. Defendant claims that he retreated out of the building where the argument began but that the victim pressed on. Finally, the defendant said he pulled a revolver from his pocket, fired a warning shot into the ground, and when that did no good, he fired approximately

five more shots into the victim. When the victim was found, the knife was beside the victim, but was closed. There was contrary evidence indicating that the victim never opened the knife.

State v. Harton, no written opinion.

Lancaster County District Court, Docket 59, Page 5.

Date of Sentence: March 31, 1982.

Sentence: 35 years.

The defendant and the victim were both residents of a city mission in Lincoln, Nebraska. Defendant, after a day of drinking, returned to the mission. He remembered that he had loaned a radio to the victim and went to the victim's room to retrieve the radio. The victim maintained that he did not have the radio. The two got into a quarrel and began fighting, pulling out knives. The defendant eventually stabbed and killed the victim.

State v. Rowe, 214 Neb. 685, 335 N.W.2d 309 (1983).

Date of Sentence: July 29, 1982.

Sentence: 25 years.

The defendant murdered his wife. The body was discovered by firefighters who were called to the scene by neighbors who reported a fire at the defendant's residence. The body was found partially burned and wrapped in blankets in one of the second floor bedrooms. The autopsy report revealed that one of the victim's breasts had been removed and that there was an incision in the trunk of the victim extending from below the breastbone to the pubic area and into the vagina and the rectum. The victim also had suffered a depressed skull fracture and broken ribs.

State v. Rife, 215 Neb. 132, 337 N.W.2d 724 (1983).

Date of Sentence: August 19, 1982.

Sentence: 30 years.

The defendant and victim were coworkers at a motel. Defendant entered the victim's apartment and asked if she wanted to "mess around." The victim started playing with the buttons on defendant's shirt, and when defendant started to unbutton victim's blouse, she said, "No, I don't want to." Defendant took a pottery vase and hit her about the head and face three or four times. He then struck her once with a mug. He went to the kitchen for a butcher knife and cut her throat.

State v. Rush, no written opinion.
Douglas County District Court, Docket 114, Page 115.
Date of Sentence: February 16, 1983.
Sentence: 15 years.
Defendant shot and killed his wife during a fight over an alarm clock.

State v. Klinginsmith, no written opinion.
Hall County District Court, Docket 31, Page 201.
Date of Sentence: May 12, 1983.
Sentence: 50 years.
The defendant killed his former wife. On the night of the murder he was sitting with his children. When his former wife returned home, a struggle ensued over a gun which the defendant had in his possession. Following the struggle, his ex-wife succeeded in getting the gun away from him and informed him that she was leaving. The defendant then obtained a knife from the house and tried to get the gun back. A second struggle ensued, which culminated in the defendant's shooting his ex-wife with the handgun.

State v. Jones, no written opinion.
Douglas County District Court, Docket 115, Page 509.
Date of Sentence: June 8, 1984.
Sentence: 12 years.
The defendant killed the victim, who was dating his former girlfriend. The killing was accomplished with a knife.

State v. Voskamp, no written opinion.
Saunders County District Court, Docket 7, Page 231.
Date of Sentence: July 30, 1984.
Sentence: 15 years.
The victim had moved in with the defendant's wife while the defendant was away driving an over-the-road truck. Upon return from his trip the defendant found the defendant's belongings in his car with a note from his wife. It told him not to return because she was seeking a divorce. The defendant took a gun and went to his wife's house. He kicked in the back door, and when the victim came running at him, the defendant shot twice, killing the victim.

State v. Valerio, no written opinion.
Banner County District Court, No. 1164.

Date of Sentence: October 18, 1984.

Sentence: 35 years.

The victim was engaged in a fight with the defendant. During the fight, the defendant cut the victim's face with his knife and apparently held him hostage. Later, the victim was taken out into the country, where he was tied up with baling twine and a gunnysack placed over his head. He was then placed in the back of a pickup truck with the defendant. At this point the defendant and possibly some of the others stabbed the victim to death. There were 18 stab wounds in all.

V. CASES INVOLVING CHARGES OF MANSLAUGHTER OR LESS.

State v. Jackson, Dakota County District Court, No. 8803. Date of Sentence: October 12, 1973. Sentence: 10 years for manslaughter.

State v. Andersen, Dawson County District Court, Docket 45, Page 296. Date of Sentence: October 26, 1973. Sentence: 3 to 9 years for manslaughter.

State v. Ralls, Lancaster County District Court, Docket 37, Page 125. Date of Sentence: February 5, 1974. Sentence: 3 to 8 years for manslaughter.

State v. Long, Dakota County District Court, No. 8934. Date of Sentence: March 25, 1974. Sentence: 2 to 7 years for manslaughter.

State v. Kinghorn, Douglas County District Court, Docket 90, Page 318. Date of Sentence: February 10, 1975. Sentence: 3 years' probation for manslaughter.

State v. Johnson, Douglas County District Court, Docket 89, Page 664. Date of Sentence: July 21, 1975. Sentence: Youth Development Center during minority.

State v. Sherman, Fillmore County District Court, No. 7726. Date of Sentence: November 4, 1975. Sentence: 10 years for manslaughter.

State v. Abbott, Richardson County District Court, Docket 6, Page 75. Date of Sentence: May 6, 1976. Sentence: 2 to 10 years for manslaughter.

State v. Rice, Lancaster County District Court, Docket 45, Page 121. Date of Sentence: September 23, 1976. Sentence: 2

years for manslaughter.

State v. Honorable, Douglas County District Court, Docket 95, Page 317. Date of Sentence: October 19, 1976. Sentence: 10 years for manslaughter.

State v. Ralls, Lancaster County District Court, Docket 47, Page 1. Date of Sentence: May 23, 1977. Sentence: 10 years for manslaughter.

State v. McGaughey, Keith County District Court, No. 6850. Date of Sentence: October 28, 1977. Sentence: 5 years for manslaughter.

State v. Lashley, Douglas County District Court, Docket 100, Page 276. Date of Sentence: February 2, 1978. Sentence: 1 year for manslaughter.

State v. Wright, Sarpy County District Court, Docket 30, Page 293. Date of Sentence: March 6, 1978. Sentence: 5 years' probation for manslaughter.

State v. Welsh, Lancaster County District Court, Docket 48, Page 86. Date of Sentence: March 20, 1978. Sentence: 10 years for manslaughter.

State v. Williams, Douglas County District Court, Docket 101, Page 246. Date of Sentence: May 12, 1978. Sentence: 2 to 4 years for manslaughter.

State v. Coleman, Douglas County District Court, Docket 102, Page 251. Date of Sentence: July 25, 1978. Sentence: 10 years for manslaughter.

State v. Denbo, Chase County District Court, No. 4121. Date of Sentence: August 2, 1978. Sentence: 18 months to 4 years for manslaughter.

State v. Ellis, Lancaster County District Court, Docket 52, Page 6. Date of Sentence: August 24, 1979. Sentence: 10 years for manslaughter.

State v. Meegan, Sarpy County District Court, Docket 38, Page 148. Date of Sentence: June 2, 1980. Sentence: 18 months to 5 years for accessory to a felony.

State v. Thomas, Sarpy County District Court, Docket 38, Page 147. Date of Sentence: June 2, 1980. Sentence: 15 months to 4 years for accessory to a felony.

State v. Leander, Sarpy County District Court, Docket 38, Page 151. Date of Sentence: June 3, 1980. Sentence: 5 to 15

years for conspiracy to commit first degree murder.

State v. Schommer, Fillmore County District Court, No. 8001. Date of Sentence: October 7, 1980. Sentence: 20 years for manslaughter.

State v. Warford, Gage County District Court, No. J-171. Date of Sentence: March 5, 1981. Sentence: 6 to 12 years for manslaughter.

State v. Ihm, Lancaster County District Court, Docket 56, Page 160. Date of Sentence: May 1, 1981. Sentence: 5 years' probation for manslaughter.

State v. Gilbert, Hamilton County District Court, No. 7812. Date of Sentence: May 29, 1981. Sentence: 10 years for manslaughter.

State v. Rath, Douglas County District Court, Docket 110, Page 213. Date of Sentence: January 25, 1982. Sentence: 6 2/3 to 20 years for manslaughter.

State v. Beverly, Douglas County District Court, Docket 112, Page 64. Date of Sentence: May 4, 1982. Sentence: 6 to 20 years for manslaughter.

State v. Alexander, Lancaster County District Court, Docket 58, Page 128. Date of Sentence: November 17, 1982. Sentence: 6 years 8 months to 20 years for manslaughter.

State v. Armour, Douglas County District Court, Docket 115, Page 677. Date of Sentence: June 19, 1984. Sentence: 4 to 7 years for manslaughter.

State v. Carr, Douglas County District Court, Docket 114, Page 787. Date of Sentence: June 29, 1984. Sentence: 1 year for accessory to a felony.

State v. Denby, Lancaster County District Court, Docket 66, Page 284. Date of Sentence: December 17, 1985. Sentence: 6 years 8 months to 20 years for manslaughter.

STATE OF NEBRASKA, APPELLEE, V. JOHN J. JOUBERT, APPELLANT.

399 N.W.2d 237

Filed December 29, 1986. No. 84-842.

1. **Pleas.** The standard for accepting a plea of guilty is that it must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant, is made understandingly, and has a factual basis.
2. _____. Before accepting a plea of guilty the trial court should examine the defendant sufficiently to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea.
3. **Sentences: Aggravating and Mitigating Circumstances.** Any serious assaultive or terrorizing criminal activity committed by the accused prior to the time of the offense may properly be considered when deciding the applicability of Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 1985).
4. _____: _____. A defendant may offer any evidence on the issue of mitigation, even though the mitigating factor is not specifically listed in Neb. Rev. Stat. § 29-2523(2) (Reissue 1985).
5. _____: _____. The balancing of aggravating circumstances against mitigating circumstances is not merely a matter of number counting but, rather, requires a careful weighing and examination of the various factors.
6. _____: _____. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), that a murder be "especially heinous, atrocious, cruel" or manifest "exceptional depravity by ordinary standards of morality and intelligence," describes in the disjunctive at least two distinct components of the aggravating circumstance which may operate in conjunction with or independent of one another.
7. _____: _____. The presence of any of the components of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) will sustain a finding that aggravating circumstance (1)(d) exists.
8. _____: _____. The words "especially heinous, atrocious, cruel," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), mean a conscienceless or pitiless crime which is unnecessarily torturous to the victim.
9. _____: _____. The phrase "exceptional depravity," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), refers and pertains to the state of mind of the actor and may be proved by or inferred from the defendant's conduct at or near the time of the offense.
10. _____: _____. For the purpose of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), "exceptional depravity" exists when the act is totally and senselessly bereft of any regard for human life as shown by the presence of the following circumstances, either separately or collectively: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim. Consequently, where one or more of those five factors are present, there may be a finding of "exceptional depravity."
11. **Sentences: Appeal and Error.** The proportionality review made under the requirements of Neb. Rev. Stat. §§ 29-2521.01, 29-2521.02, and 29-2521.03 (Reissue 1985) is limited to a comparison of the facts and circumstances of the

death penalty-imposed case under review with those of all applicable cases in which the death penalty was imposed.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Thomas J. Garvey, Sarpy County Public Defender, Owen A. Giles, Special Assistant Public Defender, and, on brief, James P. Miller, for appellant.

Robert M. Spire, Attorney General, and Melvin K. Kammerlohr, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The appellant, John J. Joubert, entered a plea of guilty to two counts of first degree murder in violation of Neb. Rev. Stat. § 28-303 (Reissue 1985). Each murder count is a Class I or Class IA felony, punishable by either life imprisonment or the imposition of the death penalty. A three-judge panel was convened pursuant to the provisions of Neb. Rev. Stat. § 29-2520(2) (Reissue 1985). The panel held a hearing and concluded that a sentence of death should be imposed on each count. Joubert appeals to this court, raising issues with regard both to his conviction as well as to his sentence. We affirm.

The facts of the case are distressing at best, but must be related in some detail for an understanding of the case. While delivering newspapers in Bellevue, Nebraska, early on the morning of Sunday, September 18, 1983, Danny Joe Eberle, 13 years of age at the time, disappeared. Following a widespread search of the area conducted by local and area law enforcement personnel with the aid of the FBI, young Eberle's body was found several miles south of Bellevue, Nebraska, during the late morning hours of September 21, 1983. When his body was recovered, both his hands and feet were bound together. His mouth was covered with tape, and he was wearing only a pair of undershorts. A number of stab wounds appeared on his body, including one to the back of his neck. Additionally, a photograph in the record disclosed a gaping wound covering the full length of the back of the left thigh and approximately 11

inches wide, which appeared as if the flesh had been cut away clear to the bone. Although an investigation continued for some time, Danny Joe Eberle's murderer was not then apprehended.

A second young boy, Christopher Walden, then 12 years of age, in the early morning hours of Friday, December 2, 1983, also disappeared. His body was subsequently found by hunters during the late afternoon hours of December 5, 1983, in a small wooded area located at the intersection of Giles and Cornhusker Roads in Sarpy County, Nebraska. He, too, was clad only in a pair of undershorts. His body exhibited a number of stab wounds. Also, his throat was slashed, and the full length and breadth of his chest and abdomen was covered with what looked like a representation of a large plant, including the stem and seven leaves. This figure appeared to have been rather carefully and deliberately carved into the skin and flesh with a sharp knife. Further investigation continued, and still no one was apprehended.

Then, on the morning of January 11, 1984, at approximately 8:30 a.m., a teacher at the Aldersgate Preschool in northeast Sarpy County was preparing for the day. She observed a car driven by a person she would later identify as Joubert approach close to the windows of the school. He stopped momentarily, looked at the teacher, and then turned around and drove off. Several minutes later, she noticed he had driven back. He did not drive up to the window this time but, rather, sat a short distance from the school, looking at her for a few seconds.

Concerned, she wrote down the license plate number of the vehicle and watched it drive away. A few minutes later, the vehicle returned and drove up to the building again. Joubert got out of the vehicle and came to the door of the school, asking for directions. She gave him the directions he requested. Claiming he could not understand her directions, he asked to use the phone. She said there was no phone inside the school. At that time he pushed her back inside the room and said to her, "Get back in there or I'll kill you." The teacher pushed Joubert out of her way and ran by him down the street to a nearby home where she called the police.

She gave the police the license number of the car she had seen

and also indicated that the person in the car looked like the composite sketch of the suspected killer of both young boys that had appeared for approximately a month in the local newspaper.

The police conducted a preliminary investigation and, by matching license numbers, picked up Joubert, a member of the U.S. Air Force, at Offutt Air Force Base located in Sarpy County.

Initially, the officials who questioned Joubert talked to him only about the incident at the Aldersgate Preschool. Soon thereafter, however, Joubert made some spontaneous admissions to those questioning him concerning the Eberle/Walden homicides. Eventually, Joubert gave a tape-recorded confession in which he filled in those facts of the Eberle and Walden slayings that the investigators had been unable to find.

Joubert told the officers that he was driving around Bellevue in his personal car, a 1979 Chevrolet Nova, in the early morning hours of September 18, 1983. He pulled up to a convenience store to get something to drink. At the time, it was still dark. He was leaning against his car, sipping his drink in the parking lot of the store, when he noticed a young boy fixing his newspapers for the day. When the boy left the parking lot, Joubert followed him. He drove past the boy and parked in a parking lot two blocks further. He got out of his car, carrying rope, some tape, and a knife, and hid behind a car or tree, where he waited. As Eberle was walking back to his bike after delivering a paper, he spoke to Joubert, who returned the greeting. Then, as Eberle turned his back on Joubert to get on his bike, Joubert grabbed him, put his hand over his mouth and a knife to his throat, and told him to come with him and not to make any sounds. Eberle did not struggle and returned to the parking lot with Joubert. Joubert ordered Eberle to lie down on his stomach next to the car. It was still dark and no one could see them. When Eberle lay down, Joubert tied his hands behind his back and then tied his feet together and placed some tape over his mouth. When all of this was done, Joubert picked Eberle up and placed him in the trunk of the car and closed the top. He then drove off.

Joubert told the officers he then drove to a somewhat

secluded place south of Bellevue, where he took Eberle out of the trunk and laid him in a ditch on the side of the road. After closing the trunk of the car, Joubert carried Eberle about 10 or 20 feet off the road into a cornfield. He told Eberle to roll over on his stomach. When Eberle did so, Joubert untied Eberle's hands, told him to remove his shirt, and told him to roll over on his back. Joubert then untied Eberle's feet and took his pants off. At this time the tape was beginning to come off of Eberle's mouth, just enough for him to talk. Joubert again pulled out the knife, and Eberle pleaded, "Don't, please don't kill me." Eberle struggled a bit, so Joubert stabbed him in the back. At this point Eberle told Joubert that if he, Joubert, would take Eberle to the hospital, Eberle would not say anything. Joubert said he did not believe Eberle, and, so, at that time he stabbed him again a couple of times. He then sliced the back of Eberle's neck. When Eberle ceased moving, Joubert, to make sure that he was dead, sliced the back of Eberle's left leg. The leg did not bleed. Joubert dragged Eberle's body a few yards away from the road and concealed it in the weeds. He wiped the knife clean with Eberle's shirt, returned to his car, and went back to his barracks, where he napped.

Dr. Blaine Roffman, a pathologist, conducted the autopsy on Danny Joe Eberle. He testified that there were a total of 11 stab wounds on Eberle's body. Eight of those wounds were penetrating stab wounds, three less deep. More importantly, however, Dr. Roffman testified that 9 of the 11 wounds were inflicted before death. Dr. Roffman was certain that death was not instantaneous. In addition, there was some hemorrhaging on the top of the skull, which must have resulted from some type of traumatic blow to the head. This very likely occurred when Eberle was being jostled about in the trunk of Joubert's car.

Dr. Roffman concluded, "I think he was aware — the victim was aware of the circumstances, and in my opinion, that was undue pain and suffering."

The record further discloses that Joubert additionally related to the investigating officers that on the morning of December 2, 1983, he again left his barracks between 6 and 6:30 a.m. and began cruising in his car. He had taken from his locker the same

knife with which he had murdered Danny Joe Eberle.

He first drove around bus stops, looking for people. Not finding anyone alone, he began to drive past the neighborhood schools. In the area of the Pawnee school, he spotted Christopher Walden walking to school. He parked his auto at the intersection of 48th and Margo and waited until Walden had walked very close to his car. Joubert then got out of the car, walked toward Walden, and got behind him. When he was very near to Walden, he called to him and told him to stop for a minute. There was no one else around. Joubert showed Walden his knife but did not pull it out. Joubert told Walden to come with him and to be quiet or Joubert would kill him. When Walden looked uncertain for a moment, Joubert put his hand on Walden's shoulder and led him to the car. When they got to the car, another car passed, so Joubert pretended that he and Walden were having a conversation. At that point Joubert told Walden to get into the car and to lie down on the floor in the front passenger seat. As Joubert started to drive off, Walden began crying. Joubert related to the investigators, "I was driving down Margo and I was thinking about letting him go . . . . He was on the floor in the front passenger seat. I just figured that if I did let him go he would probably tell someone and then what would happen to me."

Joubert drove Walden to another isolated, secluded spot. After making sure there was no one else in the area, he ordered Walden out of the car. It was cold and there was snow on the ground. They began walking along some railroad tracks. Joubert promised Walden that if Walden just followed orders and did everything that Joubert told him to do, nothing would happen to him. He told Walden to strip down to his underwear and lie down on his back. Evidently, because of the snow, Walden balked at this command, and, so, according to Joubert, he placed his hands on Walden's shoulders, around his neck, and "encouraged" him to lie down on his back. When he had done that, Joubert knelt on Walden's chest and started strangling him. Walden began struggling and, according to Joubert, looked like he was in pain. At that point, as Walden struggled to get away, Joubert took out his knife and stabbed Walden a couple of times in the back and then sliced his throat.

When Joubert thought that Walden was dead, he sliced Walden's stomach a couple of times just to make sure. Joubert then left the area, drove straight to the barracks, threw the knife into a dumpster, and went back to his room, where he went to sleep.

Dr. Jerry Wilson Jones, another pathologist, conducted the autopsy on Christopher Walden. According to Dr. Jones, Walden was stabbed a total of seven times. Two of the wounds had penetrated deeply, five had not. Dr. Jones testified that death did not occur instantaneously but that Walden was alive and cognizant for a period of time and then gradually lapsed into a coma and eventually died. In Dr. Jones' opinion, Walden could have been tortured in the manner in which he was killed. He further believed that Walden suffered during this period of time.

Joubert contends that three errors were committed by the district court prior to sentencing and that six errors were committed by the sentencing panel following his plea of guilty. With regard to the first group of assigned errors, Joubert maintains, in essence, that his pleas of guilty were not made freely, voluntarily, and knowingly in that he was induced by the district judge to enter pleas of guilty. The errors allegedly committed by the sentencing panel were (1) in finding, with respect to the Walden murder, that Joubert had a substantial history of serious assaultive or terrorizing criminal activity; (2) in finding that both murders were committed in an effort to conceal his identity; (3) in finding that both murders were "especially heinous, atrocious, cruel, and [sic] manifested exceptional depravity by ordinary standards of morality and intelligence"; (4) in finding sufficient aggravating circumstances existed to justify the imposition of the death penalty; (5) in failing to find mitigating circumstances sufficient to outweigh the aggravating circumstances; and (6) in limiting the mitigating effects of Joubert's guilty pleas when considering aggravating and mitigating circumstances.

We turn first to the questions involving whether the pleas made by Joubert and accepted by the court were made freely, voluntarily, and knowingly and whether the district court made promises which misled Joubert regarding either the pleas or the

sentences. The law regarding the requirements which must be met before a guilty plea in a criminal case can be accepted is clear and uncontroverted. In *State v. Turner*, 186 Neb. 424, 427, 183 N.W.2d 763, 766 (1971), in discussing the necessary standard for accepting a plea of guilty, we said: " 'The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " The record must show that a plea of guilty was made intelligently, voluntarily, and understandingly. Further, the plea must be based upon sufficient facts to justify the court's finding the defendant guilty beyond a reasonable doubt. When that appears, the court may accept the plea.

In *State v. Jackson*, 220 Neb. 656, 658, 371 N.W.2d 679, 681 (1985), we recently observed: " 'Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea.' "

In the instant case Joubert argues that, sometime before entering his pleas, the trial court promised him a hearing on a motion to suppress and failed to keep that promise. Therefore, Joubert argues, he is entitled to have his pleas withdrawn and the case remanded for trial. Our close examination of the record fails to support Joubert's contention as to what in fact took place and indicates beyond question that Joubert freely, voluntarily, and intelligently entered his pleas of guilty to the two charges of murder.

The record discloses that after pleas of not guilty were entered, Joubert's attorney filed a motion to suppress the statements previously given by Joubert to the authorities. The district court deferred hearing the motion and advised Joubert's attorney on the record that "any hearings on alleged statements or confessions would be deferred until such time as a jury in the case would be empaneled and sequestered." Apparently, the district court was concerned that holding a suppression hearing before the jury was empaneled and sequestered would result in undue pretrial publicity and would interfere with Joubert's opportunity for a fair trial. Joubert's lawyer was somewhat concerned about delaying the hearing and indicated that fact to

the district judge. Apparently, his concern was that he felt he could not encourage Joubert to consider any plea agreement until he knew whether the statements would be admitted or suppressed. The district court advised Joubert's attorney, on the record, that

> if in fact there is ever a plea agreement that you may enter into where a plea of guilty to some charges or lesser charges is offered, at that point in time what I would do is not receive it, but consider your motion to suppress in conjunction with the hearing on the underlying facts to support the plea agreement.

The district court also advised Joubert's attorney that if, at such a hearing, the court determined that the statements should be suppressed, Joubert would be permitted to withdraw his pleas. Though Joubert's attorney appeared to be reluctant, he ultimately agreed with the district court that such procedure could be followed.

Joubert argues that this, in some way, was a promise relating to a plea bargain and was intended to induce Joubert to enter pleas of guilty. The record does not support that contention. The district court was not encouraging Joubert to do anything, but merely was advising his counsel that if Joubert stayed with the entry of pleas of not guilty and a jury trial was required, a hearing on the motion to suppress would be held after the jury had been selected and sequestered. If, however, Joubert waived the jury trial and tendered pleas of guilty pursuant to a plea bargain, before the pleas of guilty would be accepted by the district court a hearing on the suppression motion would be conducted. The district court's explanation of the procedures to be followed was clearly in the alternative and was intended to explain what would be done, depending upon what Joubert elected to do. The choices were still clearly Joubert's, and the explanation by the district court cannot be said to have been a promise conditioned upon pleas of guilty. Joubert was told he could have a hearing on the suppression motion before trial, regardless of what pleas he entered.

The record discloses that subsequently, on July 3, 1984, pursuant to a plea bargain whereby the State dismissed two kidnaping charges and two counts of using a knife to commit a

felony, Joubert pleaded guilty to the first degree murder charges then pending. The decision to plead guilty was clearly Joubert's, and nothing in the record suggests that Joubert's decision had anything to do with earlier statements made by the district court regarding the suppression hearing.

In any event the record discloses that, before accepting the pleas of guilty, the district court examined Joubert at great length with regard to both the pleas and the pending motion to suppress. The record discloses that the district court asked Joubert a series of questions necessary to ascertain whether the pleas were being made freely, voluntarily, intelligently, and knowingly. The district court further advised Joubert that, by tendering the pleas of guilty, Joubert would waive any technical defects in the proceedings up to the time of the pleas and would further waive any pending motions that might have been of benefit to Joubert. Specifically, the court said:

> THE COURT: All right. And now more specifically, Mr. Joubert, let me ask you, do you understand there is a motion pending to suppress statements or confessions that you had allegedly made at the time of your arrest? Do you understand that if I accept the pleas of guilty, that that motion likewise is gone and you can never raise that again as an issue?
>
> MR. JOUBERT: I understand.

Neither Joubert nor his counsel in any way indicated to the court that he did not intend to waive the motion to suppress or desired at that point to have a hearing on the motion before the court accepted the pleas of guilty.

The record further reflects that the State established a factual basis for Joubert's pleas. In particular, the State described in detail the facts from the time of Joubert's apprehension up until the time of his confession. No objections were made by Joubert or his counsel to any of the facts recited by the State. When the State completed advising the court of the facts, the district judge again asked Joubert several questions. In particular, he asked:

> THE COURT: Okay. I touched earlier, Mr. Joubert, upon the various motions that you would waive if I accept the plea of guilty, and then Mr. Wellman related fully and I

have marked in evidence and received Exhibits 32 and 33, which as recited and then related in substance, that those are full confessions to police officers relating to the murders of these two boys. Are you satisfied in your own mind that you gave those statements to the officers voluntarily?

MR. JOUBERT: Yes, Your Honor.

THE COURT: Did they make any promises to you before you gave those statements?

MR. JOUBERT: No, Your Honor.

THE COURT: Did they indicate that you were under suspicion or under arrest for these crimes and that you had the right to have counsel present?

MR. JOUBERT: Yes, they did.

THE COURT: And did they indicate to you that if you could not afford counsel, the Court would appoint one for you before there would be any further questioning?

MR. JOUBERT: Yes, they did.

THE COURT: Did they indicate to you that you had a right to remain silent and not answer any of their questions?

MR. JOUBERT: Yes.

THE COURT: And prior to the time they even spoke with you did they identify themselves as law enforcement officers, be it police, sheriff's officer or FBI?

MR. JOUBERT: Yes, they did.

Further, the district court asked Joubert's counsel whether he was satisfied that the statements or confessions or admissions that had been made by Joubert were voluntarily made and that Joubert was accorded his constitutional rights prior to making those. Counsel answered, "Yes, Your Honor. I think they're clearly admissible." It was only then that the district court accepted each plea of guilty and found Joubert guilty of murder in the first degree on both counts.

Joubert's argument that there was some promise of a hearing which induced him to enter pleas of guilty to murder or that the alleged promises made by the district court which induced him to enter his pleas were unfulfilled is without any basis in fact. Not only does the record make it clear that Joubert freely and

voluntarily waived the right to a hearing on the motion to suppress, it is also clear that, though Joubert had an opportunity to present evidence to the district court regarding the confessions, he freely and voluntarily admitted that the confessions were constitutionally obtained and knowingly and voluntarily given. Had Joubert or his counsel wished to have a separate *Jackson v. Denno*-type hearing concerning the admissibility of the confessions, he was obligated to advise the court when the district court inquired as to Joubert's understanding of the guilty pleas. It is inconsistent for Joubert, on the one hand, to admit the confessions were freely and voluntarily given while, on the other hand, maintaining that a hearing to suppress the confessions would have been successful.

It is difficult to imagine what evidence could have been presented to the district court which would have caused the district court to suppress the confessions in light of the statements and admissions made by both Joubert and his attorney regarding the confessions. There is no basis for this assignment, and it is overruled.

Joubert further argues that the district court promised him life sentences in return for his pleas of guilty, and failed to fulfill that promise. Again, the record does not support that contention. The record discloses that *after* Joubert tendered his pleas of guilty and before the district court accepted the pleas, the district court said:

> THE COURT: You understand . . . that *some* consideration would be given by myself or the sentencing judges to the money-saving expense of trial . . . that comes with any pleas of guilty. . . .
>
> MR. JOUBERT: Yes.

(Emphasis supplied.) The words themselves do not appear to have been a promise or an inducement in any manner to the previous tender of guilty pleas; the plain meanings of the words provide nothing more than a statement that "some consideration" would be given. While it may have been better had the district court not attempted in any manner to advise as to the factors to be considered, in view of the fact that the hearing on sentencing had not yet been held, advising counsel

and Joubert that "some consideration" would be given by reason of the pleas of guilty falls far short of any suggestion of a promise or inducement to enter the pleas of guilty. The record clearly establishes that Joubert's pleas of guilty were made freely, voluntarily, intelligently, and understandingly and free of any promises or inducements.

Furthermore, the record discloses that the sentencing panel did consider that Joubert's pleas of guilty were mitigating factors and did give "some consideration" to that fact. The sentencing panel, after giving some consideration to the pleas of guilty, found that the mitigating circumstances did not approach or outweigh the aggravating circumstances. Any purported agreement was kept. The pleas were properly accepted, and the motion to withdraw the pleas was properly denied.

That leaves us with the errors relating to the sentences of death. As we earlier indicated, Joubert has raised six alleged errors in connection with the sentences. We shall address them individually in the order in which they are raised.

Neb. Rev. Stat. § 29-2522 (Reissue 1985) requires the sentencing court to proceed as follows:

> After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:
>
> (1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;
>
> (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> . . . .

Neb. Rev. Stat. § 29-2525 (Reissue 1985) requires the Supreme Court to review all cases in which the death penalty has been imposed.

What are aggravating and mitigating circumstances is, to a

large extent, prescribed by statute, although, as noted above, the courts are required to consider any evidence in mitigation. See *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982). Furthermore, the aggravating circumstances must be proved beyond a reasonable doubt. See, *State v. Palmer, ante* p. 282, 399 N.W.2d 706 (1986); *State v. Reeves,* 216 Neb. 206, 344 N.W.2d 433 (1984). What constitutes aggravating circumstances is not left to the discretion of either the sentencing court or the Supreme Court but, instead, is set out by statute in detail. Neb. Rev. Stat. § 29-2523(1)(Reissue 1985) defines aggravating circumstances as follows:

> (a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;
>
> (b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;
>
> (c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;
>
> (d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;
>
> (e) At the time the murder was committed, the offender also committed another murder;
>
> (f) The offender knowingly created a great risk of death to at least several persons;
>
> (g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or
>
> (h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

The mitigating circumstances, as defined by § 29-2523(2), are as follows:

> (a) The offender has no significant history of prior criminal activity;
>
> (b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

These guidelines exemplify the type of standards which must be followed in order to avoid the indiscriminate application of the death penalty. Absent such guidelines, the imposition of the death penalty in a particular case must be set aside as being in violation of the U.S. Constitution as declared by the U.S. Supreme Court. See, *State v. Palmer, supra; Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

With that background we review the record to determine whether the aggravating circumstances were established by evidence beyond a reasonable doubt.

The sentencing panel found that with regard to the Eberle crime, count I, there existed aggravating circumstances (1)(b) and (1)(d) and mitigating circumstances (2)(a) and (2)(c). The sentencing panel further found that because Joubert entered a plea of guilty, there existed an additional mitigating circumstance. With regard to the crime involving the Walden youth, count II, the panel found existing aggravating circumstances (1)(a), (1)(b), and (1)(d) and mitigating circumstance (2)(c), plus, again, the fact that Joubert pleaded guilty.

Once the existence of one or more aggravating circumstances has been found to exist, § 29-2522 requires not a mere counting of aggravating and mitigating circumstances but, rather, a reasoned judgment as to what factual situations require the imposition of death and which of those can be satisfied by life

imprisonment in light of the totality of the circumstances present. See, *State v. Palmer, ante* p. 282, 399 N.W.2d 706 (1986); *State v. Reeves,* 216 Neb. 206, 344 N.W.2d 433 (1984); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977). In reviewing and balancing the aggravating circumstances against the mitigating circumstances, the sentencing panel concluded that the aggravating circumstances outweighed the mitigating circumstances and that Joubert should be sentenced to death for both murders.

In that regard Joubert maintains first that the evidence was insufficient to establish beyond a reasonable doubt the existence of aggravating circumstance (1)(a) in connection with the Walden murder (the second of the two), in that Joubert had a substantial history of serious assaultive or terrorizing criminal activity. The record establishes beyond a reasonable doubt that, at the time of the Walden murder, Joubert had "a substantial history of serious assaultive or terrorizing criminal activity."

The facts in this case with regard to this issue are nearly identical to the facts in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982). In that case Carey Dean Moore was charged with the murders of two Omaha cabdrivers, 5 days apart. We held that the fact that Moore had killed someone prior to the murder for which he was sentenced to death was sufficient to establish the existence of an aggravating circumstance found in § 29-2523(1)(a) and that the sentencing panel properly considered this earlier murder in accordance with our prior interpretation in both *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977), and *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977).

Joubert next maintains that the evidence was insufficient to establish beyond a reasonable doubt the existence of aggravating circumstance (1)(b) in either case. Section 29-2523(1)(b) provides: "The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime." We believe that the record establishes beyond a reasonable doubt that, in addition to whatever other reasons Joubert may have had for murdering, Joubert murdered both Eberle and Walden to conceal his identity as the perpetrator of the crime of

kidnaping. The evidence is overwhelming in that regard.

With regard to the Eberle boy, Joubert admitted that after he had first stabbed Eberle in the back, Eberle asked that he be taken to a hospital and that if Joubert would take him to the hospital, he, Eberle, would not say anything. Joubert said, "I didn't believe him so I stabbed him again a couple of times." Obviously, he did not believe that Eberle would not disclose Joubert's identity; therefore, it is clear that, despite any other reasons which may have been involved, one of the reasons for committing the murder was to conceal his identity as the perpetrator of the crimes of kidnaping and assault.

To the same effect, when speaking of the Walden murder, Joubert stated:

> As I started up the car and I started driving off he started crying. I was driving down Margo and I was thinking about letting him go. . . . He was on the floor in the front passenger seat. I just figured that if I did let him go he would probably tell someone and then what would happen to me.

Again, this is clear evidence that Joubert concluded that he could not let Walden go for fear that he would be identified, and, therefore, the murder was to conceal his identity as a murderer and kidnaper. It is clear that the panel was correct when it found that aggravating circumstance (1)(b) existed in both murders.

Next, Joubert maintains that the sentencing panel erred in finding that both components of § 29-2523(1)(d) applied, in that these murders were neither "especially heinous, atrocious, cruel" nor "manifested exceptional depravity by ordinary standards of morality and intelligence." In support of his position Joubert argues that this case is identical to *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), wherein this court held that the murder was not "especially heinous, atrocious, cruel." To argue that the murders in the present case were identical to the murder in *Hunt* is to ignore the facts. The facts in the present case are clearly otherwise.

The sentencing panel in this case found with regard to § 29-2523(1)(d):

> The murder was especially heinous, atrocious, cruel, or

manifested exceptional depravity by ordinary standards of morality and intelligence. (Section 29-2523(l)(d)).

This aggravating circumstance describes in the disjunctive two separate situations which may operate in conjunction with, or be independent of, one another. The first is where the murder is especially heinous, atrocious, or cruel. In short, the first situation must be looked upon through the eyes of the victim and should be applied to cases where torture, sadism, or the imposition of extreme suffering exists. State v. Stewart, 197 Neb. 497, 250 N.W. 2d 849; State v. Rust, 197 Neb. 528, 250 N.W. 2d 867; and State v. Moore, 210 Neb. 457, 316 N.W. 2d 33.

Upon his abduction, Danny Joe Eberle's hands and feet were tightly bound, surgical tape was placed over his mouth and he was put in the trunk of defendant's automobile. He was then transported to the actual scene of the homicide several miles away and removed from the trunk of the automobile to face his abductor. His hands and feet were untied, and then retied in sequence in order for him to follow the defendant's instructions on removing his outer clothes. It was during this period of time that the surgical tape covering the victim's mouth had worked loose, and he asked the defendant if he was going to die. When the defendant replied, "Yes", Danny attempted to roll away, the only means left to resist or escape. Defendant then inflicted the first stab wound. The victim then asked the defendant to take him to a hospital, and he (Danny) would not tell anyone. Defendant did not believe this statement, and proceeded with his murderous plan.

Danny Joe Eberle's death resulted from loss of blood caused by one or more of nine antemortem stab wounds. Two additional wounds, one a deep wound to the left thigh, and one a deep wound to the left shoulder, were inflicted postmortem by the defendant. Dr. Roffman expressed an opinion that Danny Joe's death could have been directly caused by either the stab wounds in the left chest portion, or the slicing type wound to his neck. He further testified that death was not instantaneous, but the

victim would have been aware and lived at least three to four minutes. Dr. Roffman was of the further opinion these wounds caused undue pain and suffering to Danny Joe Eberle.

Christopher Walden was abducted as he walked to school on the morning of December 2nd. He was forced into defendant's car, and told to lie on the floorboard. He began to cry, and defendant thought of releasing him. Defendant realized if he released Christopher it would cause him, the defendant, trouble. He then determined to carry out his plan as quickly as possible and immediately drove several miles to the area where Christopher's body was found three days later. Upon arriving, defendant made Christopher walk to the murder site, and disrobe to his undershorts.

He then had the boy lie down and he began to manually strangle him. When he was unable to complete his gruesome task in this manner, he drew his knife and commenced a most horrid final assault.

Christopher Walden died from loss of blood caused by one or more of seven stab wounds and a large cutting wound on his neck. There were six or seven additional cutting wounds inflicted upon Christopher Walden's body postmortem, across the chest and stomach. Of the seven stab wounds inflicted antemortem, Dr. Jones, the pathologist conducting the autopsy, pointed out that five of these did not penetrate deeply, yet the body tissue was not thick at those areas. Dr. Jones' opinion was that Christopher's death was not instantaneous, but that because of these five shallow stab wounds, he could well have been tortured. Dr. Kentsmith testified in his opinion both of these young boys would have been quite humiliated by undressing in front of the defendant at his direction, and further testified upon their abduction they would have felt an intense sense of terror, overwhelming fear, helplessness, anxiety, and a sense of impending doom that they would not survive. He testified this would be an overwhelming and very painful psychological event in a person's life.

> With respect to the second clause of this aggravating circumstance, the crime must be viewed to determine the defendant's state of mind as manifested by his conduct. The manifestation of "exceptional" depravity by ordinary standards of morality and intelligence indicates a state of mind "totally and senselessly bereft of any regard for human life". State v. Holtan, 197 Neb. 544, 250 N.W. 2d 876; State v. Peery, 199 Neb. 656, 261 N.W. 2d 95; State v. Otey, 205 Neb. 90, 287 N.W. 2d [36]; State v. Harper, 208 Neb. 568, 304 N.W. 2d 663; and State v. Moore, 210 Neb. 457, 316 N.W. 2d 33.
>
> The defendant herein planned these abductions and murders far in advance, with the only missing element the actual identity of the victims. The murders were to be repetitive, presumably continuing as long as the defendant felt a need to satisfy his intellectual or sexual curiosity or urges, and the victims selected by the defendant would, by his fantasized standards, be somewhat defenseless and consist of prepubescent boys or women fitting the pictorial description gleaned from detective magazine covers. . . . In short, the evidence is overwhelming that each of these murders were [sic] "totally and senselessly bereft of any regard for human life".
>
> We recognize that all murders may be characterized as atrocious and cruel, and further recognize there must, of necessity, be some interval of time between even the most savage of knife attacks and a resulting death. We, nevertheless, conclude this aggravating circumstance is applicable with respect to both clauses, recognizing the evidence and factors on the second clause of the aggravating circumstance far outweigh those under the first clause.
>
> We conclude and find beyond a reasonable doubt this aggravating circumstance exists in both crimes for which the defendant is to be sentenced.

We agree with each of the factual findings made by the three-judge panel as set out above. We also agree with the conclusions of law as to the construction of § 29-2523(1)(d).

As we stated in *State v. Palmer, ante* p. 282, 314, 399

N.W.2d 706, 728 (1986):

> We note that the word *or* separates "especially heinous, atrocious, cruel" from "manifested exceptional depravity by ordinary standards of morality and intelligence." Thus, aggravating circumstance (1)(d) of § 29-2523 describes in the disjunctive at least two distinct components of an aggravating circumstance which may relate to a murder and which "may operate in conjunction with or independent of one another." *State v. Moore*, 210 Neb. 457, 470, 316 N.W.2d 33, 41 (1982). See, also, *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554 (1984). The presence of any of the components will sustain a finding that aggravating circumstance (1)(d) exists. See *State v. Correll*, 148 Ariz. 468, 715 P.2d 721 (1986). See, also, *State v. Gretzler*, 135 Ariz. 42, 51, 659 P.2d 1, 10 (1983), *cert. denied* 461 U.S. 971, 103 S. Ct. 2444, 77 L. Ed. 2d 1327 (regarding "heinous, cruel, or depraved," such statutory expression is in the disjunctive, " 'so either all or one could constitute an aggravating circumstance' ").

The evidence establishes beyond a reasonable doubt that each of the murders in this case was a "conscienceless or pitiless crime which [was] unnecessarily torturous to the victim" and, thus, that each of the murders was "especially heinous, atrocious, cruel" as required by § 29-2523(1)(d). *State v. Palmer, supra* at 315, 399 N.W.2d at 729.

The evidence further establishes beyond a reasonable doubt that each of the murders in this case "manifested exceptional depravity by ordinary standards of morality and intelligence."

As stated in *State v. Palmer, supra* at 320, 399 N.W.2d at 731-32:

> "[E]xceptional depravity" in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim. . . . Consequently, where one or more of those five factors are present, there may be a finding of

"exceptional depravity" concerning a first degree murder.

In this case the evidence establishes beyond a reasonable doubt that the defendant committed each murder with relish, inflicted gratuitous violence on the victim beyond that necessary to inflict death, the crimes were utterly senseless, and the victims were completely helpless.

Additionally, the murders were coldly planned as part of a repetitive program of self-gratification, involving immature victims selected on the basis of their availability at a time when the likelihood of detection was slight. See *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982).

Defendant's urge for self-gratification was described by the psychiatrists as his need to satisfy his intellectual or sexual curiosity. In an interview with Dr. Kentsmith, Joubert stated that he wanted to know "what it was like to see someone die."

The intellectual approach defendant took to the two murders involved is typified by several facts. Joubert told each of the psychiatrists in the case that, as he expressed the facts to Dr. Kentsmith, he frequently "had set my alarm clock to get up in the morning and to go out and do it [commit a murder]." Joubert told Dr. Kentsmith that 9 out of 10 times, after his alarm clock went off, Joubert would turn the alarm off and go back to sleep. He indicated that on some occasions he would get up and go looking for possible victims.

Dr. Kentsmith concluded that the psychological testing of Joubert shows a personality type which operated in an "amoral style" with an "inability to postpone gratification." Dr. Kentsmith concluded that Joubert killed for "intellectual curiosity," not for "sexual pleasure."

The circumstances in this case demonstrate beyond a reasonable doubt that the murders "manifested exceptional depravity by ordinary standards of morality and intelligence." *State v. Palmer, ante* p. 282, 399 N.W.2d 706 (1986).

The remaining assigned errors may be considered together. They are, in effect, that the mitigating circumstances outweigh the aggravating circumstances.

The record establishes no mitigating circumstances in either murder other than those found by the sentencing panel. However, we examine in some further detail the finding by the

panel that mitigating circumstance (2)(c) existed as to each murder.

As set out above, § 29-2523(2)(c) defines as a mitigating circumstance the fact that "[T]he crime was committed while the offender was under the influence of extreme mental or emotional disturbance." While we agree that subsection (2)(c) may be considered as established for purposes of sentencing, the weight to be given it is sharply diminished by the testimony of Dr. Kentsmith. Dr. Kentsmith testified that Joubert was not acting under such an influence that he could not have changed his behavior at the last moment before he actually killed the two boys.

Dr. Kentsmith testified that if Joubert had such an uncontrollable impulse, his actions "would be something that he would not plan out, that it would be something that under the influence of such strong emotion that it would occur at such a random, bizarre fashion that he would do it without any planning, without any premeditation, without any thought; just do it."

At another point Dr. Kentsmith testified:

> Well, an irresistible impulse is something that has to do with a person who is acting at the moment and behaving in such a way that even if a policeman was standing beside him, that he would go ahead and do what he's intending to do. I have not been able to see anything in the examination or any of the reports that have been given to me to indicate that he wasn't able to carefully plan and orchestrate what he was doing to some degree. That doesn't mean that he couldn't do it, that he still didn't want to do it then, but the point was that he was able to control that.

We find Dr. Kentsmith's analysis to be convincing. We therefore determine that while some weight should be given to (2)(c), that weight must be considered in the light of Dr. Kentsmith's finding that Joubert could control the mental stress he had.

The balancing of aggravating circumstances against mitigating circumstances is not merely a matter of number counting but, rather, requires a careful weighing and examination of the various factors. As we observed in *State v.*

Stewart, 197 Neb. 497, 518, 250 N.W.2d 849, 862 (1977), quoting from *State v. Dixon*, 283 So. 2d 1 (Fla. 1973):

> "It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all."

From our examination of the aggravating circumstances and the mitigating circumstances, we conclude that the aggravating circumstances which were proven to exist so far outweighed the mitigating circumstances that the imposition of the death penalty was appropriate and not arbitrary. Sufficient aggravating circumstances existed to justify the imposition of sentences of death, and the mitigating circumstances did not approach or exceed the aggravating circumstances.

The assignments of error raised by Joubert in regard to the sentences by the sentencing panel are, therefore, overruled.

That leaves us with but one final act to perform, the proportionality review required by the provisions of Neb. Rev. Stat. § 29-2521.03 (Reissue 1985). This statute requires the Supreme Court to determine the propriety of the death sentence in a case in which it has been imposed by comparing the sentence with previous cases involving the same or similar circumstances.

We have determined that the purpose of that statute is to

ensure that no sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances and that the review should include only those cases in which the death penalty was imposed. *State v. Palmer, ante* p. 282, 399 N.W.2d 706 (1986).

We have compared the facts and circumstances of this case with those of all the applicable cases in which the death penalty was imposed, as required by *State v. Palmer*. We find that the sentences imposed in this case are no greater than nor disproportionate to the sentences imposed in any other case with the same or similar circumstances.

The judgments are affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring in the result.

I concur in the result reached by the majority in this case. I believe, beyond question, that the facts of this case satisfy the requirements of Nebraska law and justify the sentencing panel's sentence of death. I am not, however, able to adopt in its entirety all of the language of the majority, and for that reason I concur separately.

As observed by the majority, Joubert maintains that the sentencing panel erred in finding that Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) applied, in that these murders were not "especially heinous, atrocious, cruel, and [sic] manifested exceptional depravity by ordinary standards of morality and intelligence." In support of his position Joubert argues that this case is identical to *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), wherein this court held that the murder was not especially heinous and that, therefore, the death penalty could not be imposed.

Joubert, like so many, misread our holding in *State v. Hunt, supra*, and fails to understand the distinction to be made between this case and *Hunt*. The language of the specific aggravating circumstance § 29-2523(1)(d) reads as follows: "The *murder* was *especially* heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." (Emphasis supplied.) Why the Legislature chose to add the word "especially" to modify "heinous" is not clear. However, a number of other

jurisdictions, including Alabama, Arizona, Florida, Louisiana, Mississippi, North Carolina, and Wyoming, have used virtually identical language in their death penalty statutes, and states such as Georgia have used similar language. The critical words, as noted by the U.S. Supreme Court and several state courts, as well as by this court, are "murder" and "especially." As we noted in *State v. Hunt, supra* at 725, 371 N.W.2d at 721: "In order for aggravating circumstance (1)(d) to be present, the method of killing must entail something more than the ordinary circumstances which attend any death-dealing violence." As limited by the Legislature, the *murder* must not only be *heinous*, which means horrible, but it must be "especially" heinous, which means horribly horrible. There is no requirement in the Constitution which requires this exact standard. Nevertheless, the Legislature has imposed such a standard upon the courts, and we are duty-bound to follow the limitation. The Legislature alone prescribes the conditions under which the death penalty may be imposed.

State v. Hunt, supra, was certainly not the first or only case to use this definition of "especially heinous," and it, in fact, reflects the nearly unanimous position taken by courts which have considered the question. Its holding is consistent with our earlier holding in *State v. Reeves*, 216 Neb. 206, 227, 344 N.W.2d 433, 447 (1984), wherein we held that aggravating circumstance (1)(d) was not present where a murder was achieved "swiftly and suddenly." Nor was it present in *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), under similar, but even more gruesome, circumstances.

This view, moreover, is consistent with national precedent. In the case of *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), the U.S. Supreme Court reviewed the Georgia statute which required that before the penalty of death may be imposed the sentencing panel must find that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 17-10-30(b)(7) (1982).

The facts of *Godfrey, supra* at 425, as disclosed by the opinion, were that the defendant

> got out his shotgun and walked with it down the hill from his home to the trailer where his mother-in-law lived. Peering through a window, he observed his wife, his mother-in-law, and his 11-year-old daughter playing a card game. He pointed the shotgun at his wife through the window and pulled the trigger. The charge from the gun struck his wife in the forehead and killed her instantly. He proceeded into the trailer, striking and injuring his fleeing daughter with the barrel of the gun. He then fired the gun at his mother-in-law, striking her in the head and killing her instantly.

The jury imposed sentences of death and found beyond a reasonable doubt that " 'the offense of murder was outrageously or wantonly vile, horrible and inhuman,' " as required by statute. *Id.* at 426. In reversing the death penalty the U.S. Supreme Court said at 428-29:

> [I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." *Gregg v. Georgia, supra*, at 196, n. 47. . . .
>
> . . . A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman."

In then concluding, however, that this ordinary sensibility was not sufficient to establish the aggravating circumstance required by the Georgia statute, the U.S. Supreme Court said at 446 U.S. at 433:

> The petitioner's crimes cannot be said to have reflected a consciousness materially more "depraved" than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes. These factors certainly did not remove the criminality from the petitioner's acts. But, as was said in *Gardner v. Florida*, 430 U. S. 349, 358, it "is

> of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

Similarly, a number of state courts have passed upon the meaning of this aggravating circumstance. Their examination provides great assistance in applying it in the instant case. In *State v. Goodman*, 298 N.C. 1, 24-25, 257 S.E.2d 569, 585 (1979), the North Carolina court said:

> G.S. 15A-2000(e)(9) states that the jury may consider as an aggravating circumstance justifying the imposition of the death penalty the fact that the "capital felony was especially heinous, atrocious, or cruel." While we recognize that every murder is, at least arguably, heinous, atrocious, and cruel, we do not believe that this subsection is intended to apply to every homicide. By using the word "especially" the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection. *State v. Stewart, supra; State v. Rust, supra; State v. Simants*, 197 Neb. 549, 250 N.W. 2d 881, *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed. 2d 158 (1977).
>
> The Florida provision concerning this aggravating factor is identical to ours. Florida's Supreme Court has said that this provision is directed at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950 [sic], 40 L.Ed. 2d 295 (1974); *see also, State v. Alford*, 307 So. 2d 433 (Fla. 1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed. 2d 1221 (1976). Nebraska has also adopted the Florida construction of this subsection. Both Florida and Nebraska have limited the application of this subsection to acts done to the victim during the commission of the capital felony itself. *State v. Rust, supra; Riley v. State*, 366 So. 2d 19 (Fla. 1979). We too believe that this is an appropriate construction of the language of this provision. Under this construction, subsection (e)(9) will

not become a "catch all" provision which can always be employed in cases where there is no evidence of other aggravating circumstances.

And in *State v. Monroe*, 397 So. 2d 1258, 1274-75 (La. 1981), the Louisiana Supreme Court said:

> Although the jury found the instant offense to have been committed in an "especially heinous, atrocious or cruel manner," this finding cannot stand. It is true that the murder was brutal—the victim lost over two quarts of blood, her lungs were punctured and one of her ribs was severed. Her death was not instantaneous, and she lived long enough to call out for her daughter and reach for the telephone.
>
> Nonetheless, in order for a murder to be "especially heinous," there must exist *evidence* that there was "torture or the pitiless infliction of unnecessary pain on the victim." *State v. English*, 367 So.2d 815, 823 (La.1979). *State v. Clark*, 387 So.2d 1124 (La.1980), provides an example of what is meant by "especially heinous." In that case the defendant stabbed the victim thirty-five times before shooting him with a gun. In the instant case, the "wounds were inflicted to kill, not to maim or to inflict pain." *State v. Culberth*, supra, at 851. While there is some evidence in this case that the offense was heinous and cruel, it was not proved beyond a reasonable doubt that the instant offense was *especially* heinous.

(Emphasis supplied.)

In *Hopkinson v. State*, 632 P.2d 79 (Wyo. 1981), the defendant, tried under a statute identical to the Nebraska statute, argued that a jury could find any murder to be especially heinous, atrocious, or cruel and therefore could conclude that this aggravating circumstance is present in all cases. He contended that it, therefore, gave the jury a free rein to decide to sentence a person to death in every case and, thus, in effect, abolished the requirements previously established by the U.S. Supreme Court for imposing the death penalty. In rejecting that argument the Wyoming court said at 153-54:

> We disagree with appellant's conclusion. The statute

> does *not* fail to properly channel the jury's sentencing decision and does *not* grant it unfettered discretion to impose the death penalty for arbitrary and capricious reasons. First, the statute requires the jury to find the murder to have been "especially heinous, atrocious or cruel." Webster's Third New International Dictionary defines heinous as "hatefully or shockingly evil." Thus the term "especially heinous" is more than just hatefully or shockingly evil. The murder, to be so classified, must demonstrate that the consciencelessness of the defendant is not only an outrage but also a dangerous and unrestrainable threat to society. Only when this is found can the murder properly be categorized as especially heinous. Since very few murders can be regarded in this manner, the term is *not* impermissible and vague.

The view of the Wyoming court is in accord with that of the U.S. Supreme Court. In *Proffitt v. Florida*, 428 U.S. 242, 255, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), *reh'g denied* 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158, Justices Stewart, Powell, and Stevens, in the Court's plurality opinion, said:

> In particular, the petitioner attacks the eighth and third statutory aggravating circumstances, which authorize the death penalty to be imposed if the crime is "especially heinous, atrocious, or cruel," or if "[t]he defendant knowingly created a great risk of death to many persons." §§ 921.141(5)(h), (c) (Supp. 1976-1977). These provisions must be considered as they have been construed by the Supreme Court of Florida.
>
> That court has recognized that while it is arguable "that all killings are atrocious . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." *Tedder v. State*, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

The necessary distinction to be made between what is simply heinous and what is especially heinous is pointed out by the

Alabama court in *Berard v. State*, 402 So. 2d 1044 (Ala. Crim. App. 1981), in which the trial court found that the homicides were "brutal" and therefore ordered the imposition of the death penalty. In discussing that matter the Alabama court said at 1050: "That the homicides were 'brutal' fails to conform to § 13-11-6(8) which requires a finding that the crime was '*especially* heinous, atrocious or cruel.' (Emphasis supplied.) The crime was in fact brutal, but the statute requires more."

Later, in the case of *McCray v. State*, 416 So. 2d 804 (Fla. 1982), the Florida Supreme Court again reviewed its statute, nearly identical to Nebraska's, and reversed a sentence of death because it found that the crime was not especially heinous, atrocious, or cruel, as previously defined by the Florida court. The facts of *McCray* indicated that a murder in which the victim died from three bullets to the stomach did not meet the statutory definition.

Similarly, in *Clark v. State*, 443 So. 2d 973, 977 (Fla. 1983), the Florida court again said:

> Directing a pistol shot to the head of the victim does not establish a homicide as especially heinous, atrocious, or cruel. *Kampff v. State*, 371 So.2d 1007 (Fla.1979). Although Mr. Satey testified that he heard his wife moan after being shot, there was no evidence of whether she was conscious after being shot, not [sic] did the medical examiner indicate how long Mrs. Satey survived or what degree of pain, if any, she suffered. Although the helpless anticipation of impending death may serve as the basis for this aggravating factor, there is no evidence to prove that Mrs. Satey knew for more than an instant before she was shot what was about to happen to her. Similarly, as pitiable as were Mr. Satey's vain efforts to dissuade his attackers from harming his wife, it is the effect upon the victim herself that must be considered in determining the existence of this aggravating factor.

The following year, Mississippi, in the case of *Billiot v. State*, 454 So. 2d 445 (Miss. 1984), considered the "especially heinous, atrocious or cruel" provision of its statute, saying at 464:

> [W]hat is intended by the words "especially heinous, atrocious or cruel", "are those capital crimes where the

> actual commission of the felony was accompanied by such additional facts as to set the crime apart from the norm of capital felonies—*the consciencelessness* [sic] *or pitiless crime which is unnecessarily tortuous* [sic] *to the victim*."

During that same year Florida, in *Gorham v. State*, 454 So. 2d 556 (Fla. 1984), held that where one shot penetrated the victim's heart, causing death within 10 seconds, and where the evidence disproved any possibility of prolonged and torturous captivity and there was no evidence whatsoever that the victim apprehended certain death more than moments before he died, the aggravating circumstance in support of the death penalty that the murder was especially heinous, atrocious, and cruel, being based as it was upon the victim's having been thereafter shot twice in the back, could not be sustained.

In so holding, the Florida court said in *Gorham, supra* at 559: "While the murder was, of course, a cruel and unjustifiable deed, there is nothing about it to 'set the crime apart from the norm of capital felonies.' " The evidence indicated that the victim was already dead when the next two shots were fired. The Florida court's position was not based upon its notion that the murder was not terrible or even heinous but that, in order for the statute to be constitutional and not permit the imposition of the death penalty in every case, the aggravating circumstance "especially heinous" must be interpreted to be limited to those few cases in which the murder was committed in such a manner as to cause torture to the victim before death in a conscienceless and pitiless way. This distinction is made not because the courts are without sensitivity but, rather, because the death penalty may not be imposed unless clear, rigid standards are first met. See, *Thompson v. State*, 456 So. 2d 444 (Fla. 1984); *Rembert v. State*, 445 So. 2d 337 (Fla. 1984); *State v. Wilson*, 467 So. 2d 503 (La. 1985).

One may question why Supreme Courts are, in a sense, required to serve as "legal pathologists" who must, in a ghoulish fashion, dissect murders in order to separate the "especially heinous" from the merely "heinous," with nothing more than a word gauge which measures when a murder ceases being merely horrible and brutal and becomes "conscienceless,

pitiless, and unnecessarily torturous to the victim." That question must, however, more appropriately be directed to the legislatures which established the standards and not to the courts upon which the duty is imposed.

The lesson of all these cases is simply that before a court can find that the murder was "especially heinous," evidence must be adduced by the prosecution that more than a murder occurred. For a murder to satisfy the aggravating circumstance created by § 29-2523(1)(d), the evidence which is relevant for purposes of determining whether the murder was "especially heinous" must establish beyond a reasonable doubt that the victim, while alive, was tortured. What occurs to the body after death may often be even more reprehensible. Yet it does not, under the law, fall within the standards established by our Legislature for determining the presence of an "especially heinous" murder.

The evidence in this case is overwhelming that both young men were horribly tortured while still alive. Their murders were clearly conscienceless and pitiless, and Joubert is most deserving of a penalty of death within the meaning of the law.

Because of reasons more detailed by me in my concurrence and dissent in *State v. Palmer, ante* p. 282, 399 N.W.2d 706 (1986), I need not here discuss my view of the phrase "exceptional depravity" as used in § 29-2523(1)(d). Unlike the majority, I do not believe that there are two separate prongs, but simply one, and that in the instant case this murder was especially heinous, atrocious, and cruel. That it "manifested exceptional depravity" is merely a further factor in establishing that it was especially heinous, atrocious, and cruel. My point of disagreement with the majority is not the result reached by the majority, but the path taken in arriving at that conclusion.

Further, for reasons more fully set out in my concurrence and dissent in *State v. Palmer, supra*, I do not agree with the majority that only cases in which the death penalty has been imposed are to be used when conducting the proportionality review required by Neb. Rev. Stat. §§ 29-2521.01 to 29-2521.03 (Reissue 1985). I do, however, believe that the facts and circumstances in this case are so unique that there are no other cases with which a comparison can be made and that regardless

of which cases are used to conduct the review, one ultimately reaches the conclusion that the penalty of death in this case was properly imposed under the standards established by the Nebraska Legislature.

STATE OF NEBRASKA, APPELLEE, V. ROBIN K. BURCHETT, APPELLANT.

399 N.W.2d 258

Filed December 29, 1986. No. 85-137.

1. **Criminal Law: Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
2. **Convictions: Proof.** A criminal conviction may be based upon the uncorroborated statements of an accomplice.
3. **Juror Qualifications: Death Penalty: Constitutional Law.** Neb. Rev. Stat. § 29-2006(3) (Reissue 1985) held constitutional.
4. _____: _____: _____. Prospective jurors who are unable to fairly determine guilt because of their opposition to capital punishment are not a cognizable group.
5. **Juror Qualifications: Homicide: Death Penalty.** In a prosecution for first degree murder, the State may use peremptory challenges to remove jurors who are opposed to the death penalty.
6. **Criminal Law: Marriage: Witnesses: Evidence: Rules of Evidence.** In a prosecution for a crime of violence, the defendant's spouse may be called to testify against the defendant as to any matter, including confidential communications. Neb. Rev. Stat. § 27-505(3)(a) (Reissue 1985).
7. **Criminal Law: Evidence: Witnesses: Plea Bargains.** An accomplice's testimony is admissible notwithstanding the fact that the testimony is procured by means of a plea bargain.
8. _____: _____: _____: _____. The promise of leniency or otherwise favorable prosecutorial treatment goes only to the credibility of the accomplice's testimony, not to its admissibility.
9. _____: _____: _____: _____. Generally, it is only where the prosecution has bargained for false or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require its preclusion.
10. **Trial: Evidence: Witnesses: Appeal and Error.** Determinations as to the qualifications of a person to be a witness or the admissibility of evidence are matters left to the sound discretion of the trial court, whose rulings will not be upset absent an abuse of discretion.

11. **Criminal Law: Homicide: Indictments and Informations.** Prosecutions for felonies, including murder, may be had on informations filed by the county attorney.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Roger C. Lott, for appellant.

Robert M. Spire, Attorney General, and William L. Howland, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The defendant was charged with first degree murder in the death of Juana Lea Rolenc. He was found guilty by the jury and sentenced to life imprisonment.

Upon appeal he has made seven assignments of error, including the contention that the evidence was insufficient to support the verdict.

In reviewing the sufficiency of the evidence to sustain a conviction in a jury trial,

> this court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury—all of which is within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.

State v. Fleming, 223 Neb. 169, 176, 388 N.W.2d 497, 502-03 (1986) (quoting *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986)).

Juana Rolenc's body was discovered in a creek north of Lincoln, Nebraska, on May 11, 1983. Several large pieces of concrete had been tied to her body. The cause of death was either a spinal injury or strangulation.

The victim was married to Clement Rolenc in 1967. The marriage was dissolved in 1981, and at the time of her death, Juana was attempting to have the original decree of dissolution, which provided her with no alimony or support, set aside.

Clement Rolenc was a patron of a bar in Gresham, Nebraska, owned by defendant Burchett. On several occasions, beginning in October of 1981, Rolenc asked Burchett if he would get rid of a body for $5,000. Burchett testified that he had not taken Rolenc seriously, although on occasion he was paid not to discuss the proposal with anyone else.

Regular contact between the two men ended in March of 1982 when Burchett closed the Gresham bar.

On May 8, 1983, Rolenc contacted Burchett at his home in Grand Island, Nebraska. During the course of the conversation, Burchett advised Rolenc that he planned to go to Lincoln on May 11, 1983. Rolenc asked Burchett to call him because he might have some farmwork for the defendant to do. Burchett did call Rolenc, and a meeting at a truckstop in Lincoln was arranged. Burchett testified that Rolenc wanted him to load rabbit hutches in Lincoln.

On May 10, 1983, Burchett asked Wayne Haselhuhn to go to Lincoln with him. Haselhuhn testified that Burchett offered him $200 for doing so, without disclosing the details of what he had to do to earn the money. The two men left for Lincoln in Burchett's car sometime after 8 the next morning. Burchett, as well as Tammie Davis, Haselhuhn's roommate, testified that the purpose of the trip was to buy drugs.

Upon arriving in Lincoln, Burchett and Haselhuhn met the Rolencs at a local truckstop. Haselhuhn, at some point, got in the Rolenc car and seated himself behind Juana, who was in the front passenger seat. Haselhuhn then strangled the victim as Rolenc drove down a country road.

Haselhuhn and Rolenc then relocated Burchett. Haselhuhn and Burchett proceeded to dispose of the body. All three men were eventually arrested and charged.

A thorough review of the record shows uncontradicted evidence that Clement Rolenc asked the defendant on several occasions if he would be interested in disposing of a body, presumably the victim's, for $5,000. The defendant admitted this was a topic of conversation between himself and Rolenc on May 8, 1983, 3 days before the murder. Burchett also admitted to asking Edwin Tierney if he would like to earn $200 by riding with him to Colorado to deliver a gunnysack. This conversation

occurred shortly before the murder. He also admitted that he had arranged to meet Rolenc at a Lincoln truckstop on May 11, 1983. At Burchett's suggestion, Wayne Haselhuhn accompanied the defendant to Lincoln on that date. When the pair arrived in Lincoln, they met Rolenc at the truckstop. At some point, Haselhuhn, who had never met Clement Rolenc before, climbed into the backseat of the Rolenc vehicle and strangled the victim.

The defendant admits that he helped dispose of the body, but claims that he did so because he was threatened by the other two men.

According to Haselhuhn, he was unaware of how he was to earn the $200 promised by Burchett, until Burchett and he had gone from the truckstop to a location southwest of Lincoln. At that point, Haselhuhn testified, the defendant told him to take the defendant's belt, sit in the Rolenc car behind the victim, and choke her. Haselhuhn testified that he complied with this directive.

Burchett, in his testimony, indicated that his only purpose in meeting Rolenc in Lincoln was to assist Rolenc in loading rabbit hutches; that the overall purpose of the trip was to purchase marijuana. When he arrived in Lincoln, Burchett testified, he did not feel like moving the hutches because he was high from smoking marijuana. Haselhuhn allegedly expressed interest in taking Burchett's place. According to Burchett, Haselhuhn agreed, at the truckstop, to help Rolenc move the hutches. It was agreed that Burchett would meet the other two men in an hour at Yankee Hill brick company. Burchett then left Haselhuhn with the Rolencs and proceeded to his in-laws' (the Tierneys') home. Terry Tierney, the defendant's brother-in-law, corroborated Burchett's testimony that he visited the Tierney residence alone.

When he later met with Rolenc and Haselhuhn near Yankee Hill brick company, Burchett testified that Rolenc was armed and ordered him to open the trunk of his (Burchett's) car. After the victim was transferred to Burchett's trunk, Rolenc ordered the other two men to take her to the Missouri River. Burchett testified that he complied with the order to dispose of the body because he was afraid of the other two men. When Haselhuhn

got in the car, he had two envelopes full of money, one of which he threw on the dashboard and which, according to Burchett, was for taking the victim to the river.

En route to the creek where the victim's body was left, the defendant made two stops where he had the opportunity to flee. The first was at a gas station in Lincoln. As the defendant filled his vehicle with gasoline, Haselhuhn used the restroom. Burchett testified he was too frightened to flee. The second stop was at a store because, according to Burchett, Haselhuhn wanted to get rope to tie rocks to the victim's body. Burchett went in to purchase the rope as Haselhuhn waited in the car. Again, Burchett testified that he took no action to escape as he was "scared" and thought he was just as involved as the others at this point.

Basically, the defendant's assignment is an attack on the credibility of Haselhuhn's testimony. It is true that Haselhuhn's testimony was contradicted in several respects by the independent testimony of other witnesses. The most significant of these is Haselhuhn's testimony that he and Burchett stopped at a Lincoln home after they had disposed of the body. The description of the house did not match that of the Tierney residence, nor did Haselhuhn's testimony coincide with Terry Tierney's testimony that Burchett was at the Tierney residence alone.

The defendant claims that Haselhuhn's credibility is eroded by the fact that he made several false statements, after which he was pushed by law enforcement authorities, until he reached his final statement. There was also evidence that Haselhuhn was a convicted felon with severe alcohol and drug problems. In fact, the evidence showed that Haselhuhn used large amounts of alcohol and drugs on both the evening of May 10 and the early morning and daytime hours of May 11, 1983.

A criminal conviction may be based upon the uncorroborated statements of an accomplice. *State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985); *State v. Huffman*, 214 Neb. 429, 334 N.W.2d 3 (1983).

Haselhuhn's testimony was corroborated in many respects. Much of the defendant's own testimony corroborates Haselhuhn's statement of the basic facts. His testimony is also

supported by that of the State's rebuttal witness, Victor Harrod, who testified that Burchett admitted to hiring Haselhuhn to kill the victim. According to Harrod, this statement occurred while he and Burchett were cellmates in the Lancaster County jail.

The evidence contradicting Haselhuhn's testimony was before the jury, which had the duty to weigh the evidence and determine the credibility of the witnesses. Although Haselhuhn had much to gain by agreeing to testify against his codefendants, his credibility was a matter for the jury.

Taking the view of the evidence most favorable to the State, the evidence was sufficient for the jury to find beyond a reasonable doubt that Wayne Haselhuhn killed the victim after being hired by the defendant to do so.

In pretrial motions Burchett moved (1) to dismiss the information for lack of presentment or indictment of a grand jury, (2) to preclude "death qualification" of the jury, (3) to preclude the use of peremptory challenges to exclude persons opposing the death penalty, (4) to declare Neb. Rev. Stat. § 29-2006(3) (Reissue 1985) unconstitutional, (5) to prohibit the State from compelling his wife, Bonnie, to testify against him, and (6) to preclude Haselhuhn's testimony. All of these motions were overruled.

Three of the defendant's assignments of error relate to "death qualification" of the jury. Initially, Burchett argues that the trial court erred in overruling his amended motion to preclude "death qualification" of the jury.

Prospective jurors in this case were questioned by the court as follows:

> I have a question for you. The charge against the defendant which I previously read from the Information is an accusation of murder known in the law as murder in the first degree. The law provides that if anyone is found guilty beyond a reasonable doubt by a jury, of first degree murder, the judge or panel of judges then must decide what the penalty is going to be. One possible penalty for first degree murder is life imprisonment and another possible penalty is capital punishment, the death penalty. The jury in this case that will decide whether or not the

> defendant is guilty of murder in the first degree will be instructed that if the defendant is convicted, the jury has nothing whatever to do with the punishment and must not consider punishment in arriving at a verdict as to whether the defendant is guilty. Knowing then that the judge, not the jury, must impose the sentence in the event of the conviction of the defendant, do you have any reservations, feelings or convictions about the death penalty which would prevent you from making an impartial decision as to the defendant's guilt?

The essence of the defendant's argument is that death qualification results in a jury which is not representative of a fair cross-section of the community and is conviction-prone. See, U.S. Const. amend. VI; Neb. Const. art. VI, § 1. Burchett relies upon *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), *aff'd* 758 F.2d 226 (8th Cir. 1985), which has since been reversed in *Lockhart v. McCree,* 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986), for the proposition that death penalty opponents are a distinct group, the exclusion of which creates a conviction-prone jury in violation of the defendant's constitutional rights.

The question faced by the Court in *McCree, supra* at 165, was whether the Constitution prohibited "the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial." The death qualification issue in *McCree* differs from that before us because in Nebraska the judge rather than the jury is responsible for sentencing upon conviction in a capital case. See Neb. Rev. Stat. § 29-2520 (Reissue 1985).

Section 29-2006(3) provides that a prospective juror may be challenged for cause where "in indictments for an offense the punishment whereof is capital . . . his opinions are such as to preclude him from finding the accused guilty of an offense punishable with death." While a prospective juror's attitudes about capital punishment are irrelevant to sentencing in Nebraska, they may be relevant to his ability to fairly determine the defendant's guilt or innocence. Prospective jurors who are

excused because they are unable either to fairly determine guilt or to fairly impose a sentence because of their opposition to capital punishment are both subsets of the group of death penalty opponents which the defendant maintains is a cognizable group. The U.S. Supreme Court rejected the cognizable group claim in *McCree, supra*, and we do the same.

In *McCree* the Court had before it much of the social science evidence which is present in the record of this case. In *McCree, supra* at 1764, the Court held that even assuming studies prove that a "death-qualified" jury is more conviction-prone than one not so qualified, "the Constitution does not prohibit the States from 'death qualifying' juries in capital cases." See, also, *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986); *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986). The decision is based on the conclusion that the fair cross-section requirement has never been used to invalidate for-cause or peremptory challenges or to require that petit juries mirror the composition of the community at large. Even assuming the fair cross-section requirement does extend to petit juries, the Court concluded that "groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors . . . are not 'distinctive groups' for fair cross-section purposes." *McCree, supra* at 1765. The prospective jurors excluded in *McCree* were viewed as a nondistinct group because their exclusion did not contravene the purposes of the fair cross-section requirement. Also, death qualification, unlike the wholesale exclusion of a race, sex, or nationality, "is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case . . . ." *McCree, supra* at 1766.

In the present case, as in *McCree*, persons excluded as the result of "death qualification" were excluded because of their inability to serve as impartial jurors and not to defeat the protections of the fair cross-section requirement. As such, we do not view the group as distinct.

Burchett also contends that § 29-2006(3) is unconstitutional to the extent that it permits questioning beyond a juror's admission that his opposition to capital punishment is so strong

as to prevent him from fulfilling his obligations as a juror. He does not cite us to instances in the record where this has occurred, but maintains that such questioning results in a "process effect." The "process effect" is defined by the defendant's expert witness, Dr. Bronson, as the effect that results from "death-qualifying" procedures. The process is said to negatively affect juror attitudes about the defendant. We have previously questioned the validity of the Haney "process effect" studies relied upon by Dr. Bronson in forming his opinion. *State v. Peery, supra.*

Nevertheless, any argument that a "death-qualified" jury is partial or biased, which is the essence of this claim, must fail because "an impartial *jury* consists of nothing more than '*jurors* who will conscientiously apply the law and find the facts.' " *Lockhart v. McCree,* 476 U.S. 162, 178, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). The statute in question serves to ensure that the petit jury is in fact impartial. The statute as such is constitutionally sound. See, also, *State v. Peery, supra; State v. Rust, supra.*

Burchett next contends that the trial court erred in overruling his motion to prevent the use of peremptory challenges by the State to remove all or most of the jurors who oppose the death penalty.

We addressed this issue in *State v. Peery, supra.* There, the defendant claimed that the State had used its peremptory challenges to deprive him of a fair and impartial jury by striking jurors who opposed the death penalty. The record indicated that one juror with some concern about the death penalty was excused on a peremptory challenge by the State, while another with similar attitudes was seated as a juror.

In determining that there was no constitutional violation, we noted that one inference to be drawn from *McCree* "is that the U.S. Supreme Court does not view the U.S. Constitution as doing away with peremptory challenges." *State v. Peery*, 223 Neb. 556, 563-64, 391 N.W.2d 566, 572 (1986). We reasoned further that while it is an equal protection violation for the State to use its peremptory challenges to exclude members of the defendant's race solely on racial grounds under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69

(1986), "[t]hat holding . . . does not prevent the use of peremptory challenges to exclude from a jury a venireperson who holds a point of view inimical to that espoused by the State." *State v. Peery, supra* at 564, 391 N.W.2d at 572.

In the present case four jurors who expressed some opposition or uncertainty in their views as to the death penalty were passed for cause, then stricken by the State through peremptory challenges. Another, who stated that she could act impartially so long as she did not have to pass sentence, was seated as a juror. Under *State v. Peery, supra*, the challenges were constitutional.

The defendant contends the trial court erred in allowing his wife to testify against him. Prior to trial, Burchett filed a motion in limine to preclude the State from adducing evidence against him from his wife, Bonnie Burchett. The motion was sustained on the ground that application of Neb. Rev. Stat. § 27-505 (Reissue 1985), as amended by 1984 Neb. Laws, L.B. 696, to conversations prior to the effective date of the bill would amount to an ex post facto law. The legislative bill amended the statute to eliminate the husband-wife testimonial privilege "in any criminal case where the crime charged is a crime of violence." § 27-505(3)(a); 1984 Neb. Laws, L.B. 696, § 1.

Later, the trial court modified its order to the effect that while Mrs. Burchett could not be compelled to answer questions involving confidential communications, she could be compelled to testify as to other matters.

The trial court restricted Mrs. Burchett's testimony because the defendant had been advised by counsel prior to the passage of L.B. 696 that he could talk freely with his wife. There is no showing that the defendant detrimentally relied upon the advice of counsel that his wife would not be allowed to testify as to *acts* she had observed.

The record shows that Mrs. Burchett did not testify as to any confidential communication. Instead, her testimony included information about her children; past neighbors and addresses; the defendant's and her own employment history; financial matters; the events of Mother's Day 1983 when a man in an automobile stopped at their home; matters she discussed with this man; the length of time her husband spent talking to the

man and the fact that they left together for about 20 minutes; the defendant's activities on May 11, 1983; the fact that her children returned home with the defendant with new bicycles that afternoon; the price of the bicycles; the fact that she received a $100 bill from her husband that afternoon; and her husband's acquaintance with Haselhuhn. The State points out that, for the most part, all of these matters could have been proved by other witnesses.

The gist of Burchett's argument is that prior to the amendment of § 27-505(3), he had a reasonable expectation of privacy not only in confidential communications with his wife but also in family activities which took place in confidential surroundings. Burchett maintains that his wife should not have been called to testify against him at all.

The relevant portions of § 27-505, prior to the 1984 amendment, provided:

> (1) Neither husband nor wife can be examined in any case as to any confidential communication made by one to the other while married, nor shall they after the marriage relation ceases be permitted to reveal in testimony any such communication while the marriage subsisted except as otherwise provided by law. This privilege may be waived only with the consent of both spouses. After the death of one, it may be waived by the survivor.
>
> (2) During the existence of the marriage, a husband and wife can in no criminal case be a witness against the other. This privilege may be waived only with the consent of both spouses.
>
> (3) These privileges may not be claimed:
>
> (a) In any criminal case where the crime charged is rape, adultery, bigamy, incest, or any crime committed by one against the person or property of the other or of a child of either or in any criminal prosecution against the husband for wife or child abandonment.

§ 27-505 (Reissue 1979).

In response to Burchett's argument the State cites § 27-505(1) (Reissue 1985) and argues that only confidential communications are protected by the statute. The statutory basis of the defendant's motion in limine and objection was

§ 27-505(2) (Reissue 1979), which, as previously noted, precludes *adverse* spousal testimony in criminal cases, with only a few limited exceptions.

The language of § 27-505(2) prior to the 1984 amendment suggests that if the trial court was correct in ruling that the amended statute would amount to an ex post facto law if applied retrospectively, Mrs. Burchett should not have been allowed to testify at all. *State v. Palmer*, 215 Neb. 273, 338 N.W.2d 281 (1983) (*Palmer II*).

Neither party on appeal briefed the issue as to whether the amended statute is ex post facto, at least in part, as applied in this case.

Today, in *State v. Palmer, ante* p. 282, 399 N.W.2d 706 (1986) (*Palmer III*), we held that § 27-505 as amended was not ex post facto in application to Palmer, who was convicted of felony murder. Under that decision Mrs. Burchett could have been called to testify as to any matter, including confidential communications. We conclude that there was no error in permitting Mrs. Burchett to testify against the defendant and that the rule stated in *Palmer III* is applicable here.

Burchett also contends that the trial court erred in admitting the testimony of Wayne Haselhuhn. The basis of this argument is that Haselhuhn testified under a plea bargain agreement which required that he testify to his last version of the events leading to Juana Rolenc's death in exchange for the State's promise not to present evidence of aggravating circumstances at his sentencing hearing. Burchett contends that it was an abuse of discretion to allow Haselhuhn to testify, because he was required to testify to the satisfaction of the prosecutor in order to receive the benefit of the plea bargain, i.e., life imprisonment as opposed to a sentence of death.

The general rule announced in other jurisdictions is that "an accomplice's testimony is admissible notwithstanding the fact that the testimony is procured by means of a plea bargain. The promise of leniency or otherwise favorable prosecutorial treatment goes only to the credibility of the accomplice's testimony, not to its admissibility." *State v. Garcia*, 102 Idaho 378, 386, 630 P.2d 665, 673 (1981). See, also, *Kelley v. State*, 460 N.E.2d 137 (Ind. 1984); *State v. DeWitt*, 286 N.W.2d 379 (Iowa

1979); *State v. Leonard*, 74 N.C. App. 443, 328 S.E.2d 593 (1985).

Generally, it is only where the prosecution has bargained for false or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require its preclusion. *United States v. Librach*, 536 F.2d 1228 (8th Cir. 1976); *State v. Garcia, supra; State v. DeWitt, supra.*

The plea agreement in the present case provided, inter alia, that (1) Haselhuhn would plead guilty to first degree murder as soon as feasible after disposition of the cases against Clement Rolenc and Robin Burchett; (2) Haselhuhn would assist the State in the investigation and prosecution of people involved in the murder, including, but not limited to, Burchett and Rolenc, "by speaking truthfully with a representative of plaintiff and testifying truthfully at any Court hearing . . . regarding Wayne Haselhuhn's knowledge of the circumstances surrounding the death of Juana Rolenc"; and (3) the State, in consideration of Haselhuhn's performance under the agreement, would present no evidence of aggravating circumstances and would recommend life imprisonment at his sentencing.

As we stated in *State v. Irish*, 223 Neb. 578, 391 N.W.2d 137 (1986), determinations as to the qualifications of a person to be a witness or the admissibility of evidence are matters left to the sound discretion of the trial court, whose rulings will not be upset absent an abuse of discretion.

Burchett points to the testimony of Haselhuhn's attorney, Kirk Naylor, Jr., as support for his argument that Haselhuhn's plea agreement forced him to testify to certain events, regardless of the truth. Naylor testified that Haselhuhn had in fact given law enforcement officials several different versions of his involvement in the killing when the matter was first investigated. The final version implicating Burchett was understood by Naylor and the prosecutor to be truthful for purposes of the plea agreement. Naylor testified that there was no discussion regarding what would happen if Haselhuhn failed to testify in conformance with this final statement.

The Lancaster County attorney, Michael Heavican, testified that his office would determine if Haselhuhn's testimony at trial was in fact truthful. To make this determination Haselhuhn's

testimony was to be compared to other evidence, and possibly his previous statements. While he would have been surprised by Haselhuhn's testimony if it absolved Burchett of fault in the killing, Heavican testified that he would look at all the facts to determine if such testimony violated the agreement. According to Naylor, the plea agreement was not conditioned upon a jury verdict against Burchett.

While there was question concerning Haselhuhn's credibility, there is no clear showing that the plea agreement required anything but truthful testimony on his part. As such, Haselhuhn's testimony was not so tainted as to require its preclusion.

Burchett contends that the trial court erred in failing to dismiss the information filed against him because it is unconstitutional to charge a capital offense except by presentment or indictment of a grand jury. This court has addressed the same or similar arguments on several occasions. In those cases we have determined that prosecutions for felonies, including murder, may be had on informations filed by the county attorney. *Jackson v. Olson*, 146 Neb. 885, 22 N.W.2d 124 (1946); *Hawkins v. State*, 60 Neb. 380, 83 N.W. 198 (1900); *Bolln v. State*, 51 Neb. 581, 71 N.W. 444 (1897), *aff'd* 176 U.S. 83, 20 S. Ct. 287, 44 L. Ed. 382 (1900). Further, it is clear that such a procedure violates neither the 14th amendment to the federal Constitution nor the due process clause of the Nebraska Constitution. *Bolln v. State, supra; Hurtado v. California*, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884); *State v. Lehman*, 203 Neb. 341, 278 N.W.2d 610 (1979); *Jackson v. Olson, supra.*

There being no error, the judgment is affirmed.

AFFIRMED.

MARATHON REALTY CORPORATION, A NEBRASKA CORPORATION, APPELLEE, V. ALVIN E. GAVIN, APPELLANT.

398 N.W.2d 689

Filed January 2, 1987. No. 85-405.

1. **Judgments: Appeal and Error.** Where in a law action a jury has been waived, the findings and judgment of the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong.
2. **Brokers: Real Estate: Sales.** In order for a broker employed to secure a purchaser of realty to recover a commission, his or her efforts must be the efficient procuring cause of the sale.
3. _____: _____: _____. The efforts of a broker employed to secure a purchaser of realty have been the efficient procuring cause of the sale when the broker has secured a prospective purchaser who is ready, willing, and able to buy the property on terms and conditions upon which the broker is authorized to secure a purchaser, or on terms acceptable to the seller.
4. _____: _____: _____. Efforts which produce a series of unbroken, continuous events culminating in the sale of realty are the efficient procuring cause of the sale, notwithstanding the fact that such efforts may not be the sole cause of the sale.
5. **Brokers: Real Estate: Options to Buy or Sell: Sales.** A broker is not entitled to a commission for producing a prospective buyer willing to execute only an option to purchase realty.
6. **Options to Buy or Sell: Real Estate: Contracts: Sales.** Once an option to purchase is exercised, it becomes a contract for the purchase and sale of the realty.
7. **Contracts: Options to Buy or Sell: Real Estate: Brokers: Sales.** Neb. Rev. Stat. § 36-107 (Reissue 1984) requires that every contract between the owner and any broker or agent employed to sell land is void unless the contract is in writing and subscribed by both the owner and the broker or agent; the contract must also describe the land to be sold and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.
8. **Real Estate: Options to Buy or Sell: Brokers: Sales.** One who is a joint owner of realty but represents himself or herself to be the sole owner thereof may not avoid full payment of an agreed commission on the ground that another also has an interest in the property.
9. _____: _____: _____: _____. A broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed or by said owner's inability to convey good title to real estate because of the failure to obtain a joinder in the conveyance by a third party who has an interest in the land.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

John E. Rice, for appellant.

Joseph L. Leahy, Jr., of Epstein & Leahy, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

Following a bench trial, plaintiff-appellee, Marathon Realty Corporation, a Nebraska corporation, recovered a $21,000 judgment against defendant-appellant, Alvin E. Gavin, for a commission arising from the sale of certain realty. Gavin assigns as errors the trial court's findings that (1) Marathon was the efficient procuring cause of the sale, (2) the agreement between Marathon and Gavin had not expired prior to the sale, and (3) Gavin, although only a joint owner of the real estate, is responsible to Marathon for the entire commission. We affirm.

On December 8, 1981, Marathon and Gavin executed a written agreement whereby Marathon undertook to sell, within the ensuing 12 months, certain realty in Sarpy County to a prospective buyer whose identity was known to Marathon but not to Gavin. The agreement recited that Gavin was the owner of the realty; in truth and fact, however, he owned it jointly with his estranged wife. The agreement further provided that if the sale were made, Gavin would pay Marathon a commission of 6 percent of the gross sales price. Within the next 2 or 3 weeks, Marathon and Gavin executed a second written agreement, also dated December 8, 1981, which was identical to the first except that the second agreement identified Albertson's Supermarkets of Boise, Idaho, as the prospective buyer. Gavin's wife signed neither of the aforedescribed agreements.

Marathon had had a contact with Albertson's prior to December 8, 1981, at which Marathon learned of Albertson's possible interest in acquiring the realty in question. After the first agreement was signed, Marathon, through a series of telephone calls, correspondence, and in-person conversations, provided Albertson's with information concerning the realty. Much of that information was acquired from Gavin.

On July 9, 1982, Gavin and his wife signed a document, prepared by Albertson's and transmitted to them through Marathon, which granted Albertson's an option to purchase the realty in question. That document provided that the Gavins

would pay Marathon a 6-percent commission. Albertson's, however, rejected that option and, instead, on October 18, 1982, accepted a different option which it had also prepared and transmitted directly to the Gavins. This second option made no provision for the payment of a commission to Marathon but did provide that "[a]ll brokerage commissions" were to be paid by the Gavins. It appears that Marathon had no contact with Albertson's after presenting the first option to the Gavins.

The option accepted by Albertson's expired, as extended, on October 13, 1983. On that date the Gavins executed a general warranty deed conveying the subject realty to Albertson's. On October 14, 1983, the Gavins received $350,000 from Albertson's, and the deed which had been executed the previous day was filed with the register of deeds. Marathon was not permitted to participate in these transactions, although it had sought to do so. Gavin refused to pay Marathon any commission, and this suit followed.

Having reviewed the facts, we proceed to a consideration of Gavin's assignments of error. In doing so it is to be kept in mind that where in a law action a jury has been waived, the findings and will not be set aside unless they are clearly wrong. *Chlopek v. Schmall, ante* p. 78, 396 N.W.2d 103 (1986); *Kreikemeier v. McIntosh,* 223 Neb. 551, 391 N.W.2d 563 (1986); *Lis v. Moser Well Drilling & Serv.,* 221 Neb. 349, 377 N.W.2d 98 (1985).

Gavin's first assignment of error is based on the rule that in order for a broker employed to secure a purchaser of realty to recover a commission, his or her efforts must be the efficient procuring cause of the sale. *Abboud v. Cir Cal Stables,* 190 Neb. 396, 208 N.W.2d 682 (1973). The efforts of such a broker have been the efficient procuring cause of the sale when the broker has secured a prospective purchaser who is ready, willing, and able to buy the property on terms and conditions upon which the broker is authorized to secure a purchaser, or on terms acceptable to the seller. *Oehlrich v. Gateway Realty of Columbus, Inc.*, 209 Neb. 417, 308 N.W.2d 327 (1981); *Huston Co. v. Mooney,* 190 Neb. 242, 207 N.W.2d 525 (1973); *Wisnieski v. Coufal,* 188 Neb. 200, 195 N.W.2d 750 (1972). Cf.

Armstrong v. Hartford Life Ins. Co., 219 Neb. 128, 361 N.W.2d 511 (1985). Efforts which produce a series of unbroken, continuous events culminating in the sale of realty are the efficient procuring cause of the sale, notwithstanding the fact that such efforts may not be the sole cause of the sale. See *United Farm Agency of Ala. v. Green*, 466 So. 2d 118 (Ala. 1985).

The evidence establishes that Marathon brought the fact of Albertson's interest in the realty to Gavin's attention and performed a number of services which assisted Albertson's in making its decision to buy. Under that circumstance it cannot be said the trial court's finding that Marathon's efforts were the efficient procuring cause of the sale is clearly wrong. Thus, the first assignment of error is without merit.

Gavin's second assignment, that his agreement with Marathon had expired prior to the sale, rests on the facts that Albertson's signed a mere option to purchase realty and that the sale was not completed until a day after that option had expired.

It is true that where the seller does not prevent the exercise of the option, a broker is not entitled to a commission for producing a prospective buyer willing to execute only an option to purchase realty. *DaLee Realty, Inc. v. Kuhl*, 209 Neb. 6, 305 N.W.2d 891 (1981). This is so because an option in and of itself does not create a binding obligation to either sell or purchase the realty. See *Struempler v. Peterson*, 190 Neb. 133, 206 N.W.2d 629 (1973). However, once an option to purchase is exercised, it becomes a contract for the purchase and sale of the realty. *Struempler v. Peterson, supra*. Thus, when Albertson's exercised the second option, a contract came into existence obligating Albertson's to buy and the Gavins to sell the realty. That option was exercised on October 13, 1983; consequently, Marathon's efforts produced a purchaser who was ready, willing, and able to buy the realty on terms acceptable to Gavin within the period his agreement with Marathon was in existence.

Moreover, the deed conveying title to the realty from the Gavins to Albertson's was executed within the period the option

existed. That the purchase price was paid the day after the option expired does not alter the fact that it was the contract created by the option which was fulfilled. Thus, the trial court's finding that the agreement between Marathon and Gavin had not expired prior to the sale is correct, and Gavin's second assignment of error fails.

In connection with his third and last assignment, Gavin urges that in no event should he be held liable for more than one-half of the commission, as he was but a joint owner of the realty.

Nebraska law provides that every contract between the owner and any broker or agent employed to sell land is void unless the contract is in writing and subscribed by both the owner and the broker or agent. The contract must also describe the land to be sold and set forth the compensation to be allowed by the owner in case of sale by the broker or agent. Neb. Rev. Stat. § 36-107 (Reissue 1984). The agreement between Marathon and Gavin complied with these requirements. It is to be noted at the outset that this suit does not concern itself with Gavin's rights, if any, against his wife, only with Marathon's rights against Gavin as a signatory to an agreement which recited that he was the owner of the realty.

The law of this jurisdiction has long been that one who is a joint owner of realty but represents himself or herself to be the sole owner thereof may not avoid full payment of an agreed commission on the ground that another also has an interest in the property. *Koliha v. Jonas*, 98 Neb. 790, 154 N.W. 556 (1915); *Bell v. Stedman*, 88 Neb. 625, 130 N.W. 257 (1911); *Valerius v. Luhring*, 87 Neb. 425, 127 N.W. 112 (1910). See, also, *Sohler v. Christensen*, 151 Neb. 843, 39 N.W.2d 837 (1949). When the broker secures a prospective buyer who is ready, willing, and able to purchase the subject property, the person who hired the broker has received the service for which he or she has contracted, and the broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed, *Wisnieski v. Coufal*, 188 Neb. 200, 195 N.W.2d 750 (1972), or by said owner's inability to convey good title to real estate because of the failure to obtain a joinder in the conveyance by a third party who has an interest in the land,

Peters v. Dreger, 146 Neb. 670, 21 N.W.2d 436 (1946). There is no legal merit to Gavin's third assignment. The agreement which Gavin signed recited that the broker would recover a commission if the prospective buyer purchased the property. Gavin received the service for which he contracted and must now pay the agreed consideration for that service.

Since the record does not sustain any of Gavin's assignments of error, the judgment of the trial court is affirmed.

AFFIRMED.

DEUTSCHE CREDIT CORPORATION, A DELAWARE CORPORATION, APPELLANT, V. HI-BO FARMS, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

398 N.W.2d 693

Filed January 2, 1987. No. 85-512.

1. **Uniform Commercial Code: Security Interests: Notice: Words and Phrases.** A guarantor, being one "who owes payment or other performance of the obligation secured," is a "debtor" as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980), and is thus entitled to notice of sale of collateral under the provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980).
2. **Uniform Commercial Code: Security Interests: Notice.** An ambiguity in a notice sent pursuant to the requirements of Neb. U.C.C. § 9-504(3) (Reissue 1980) is to be resolved against the drafter of the notice.
3. **Summary Judgment.** Summary judgment is to be granted to the moving party where there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and the moving party is entitled to judgment as a matter of law.
4. _____. In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence.
5. _____. The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; that party must therefore produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed.

W. Eric Wood of Dwyer, Pohren, Wood & Heavey, for appellant.

Kent L. Frobish of Erickson & Sederstrom, P.C., for appellees.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

Plaintiff-appellant, Deutsche Credit Corporation, a Delaware corporation, brought a suit for a deficiency judgment against defendants-appellees, Hi-Bo Farms, Inc., a Nebraska corporation, Allen Bors, Janice Bors, Dale E. Hinz, and Carol Hinz. The noncorporate defendants, who guarantied Hi-Bo Farms' debt, each moved for a summary judgment against plaintiff. The trial court sustained the motion, thereby dismissing plaintiff's suit as to each of the guarantors. Plaintiff's four assignments of error converge to present a single issue: whether the trial court correctly determined that plaintiff failed to give each of the guarantors notice, as a consequence of which plaintiff is barred from recovering a deficiency judgment from any one of them. We affirm.

On June 28, 1981, Hi-Bo Farms purchased farm machinery on a retail installment contract from Friend Implement Company for a total deferred purchase price of $130,599.82, which contract included a security interest in favor of Friend Implement. Friend Implement then assigned the security interest to Fiat Credit Corporation. Fiat later filed a restated certificate of incorporation in the State of Delaware to change its name to D.B. Credit Corporation. A second Delaware restated certificate of incorporation changed the name to the present Deutsche Credit Corporation.

Concurrent with the signing of the contract between Hi-Bo Farms and Friend Implement, each of the noncorporate defendants entered into a guaranty with Fiat. One guaranty was signed by Allen Bors, who was a vice president of Hi-Bo Farms, and Janice Bors, who was the treasurer. A second guaranty was signed by Dale Hinz, who was president of Hi-Bo Farms, and

Carol Hinz, who was the secretary. The guaranties made the individuals personally liable for the debts of Hi-Bo Farms.

Hi-Bo Farms defaulted, and plaintiff accelerated the balance due under the terms and conditions of the retail installment contract and security agreement. Hi-Bo Farms then surrendered the equipment to plaintiff. Thereafter, plaintiff mailed a separate notice of private sale to Hi-Bo Farms as well as to each of the guarantors. Each notice reads as follows:

> RE: HI-BO FARMS INC.
>
> You are hereby notified by and on behalf of the undersigned secured party that by virtue of the default under the terms and provisions of a security agreement executed by the captioned Debtor dated 06-28-81, the undersigned secured party, holder of the aforesaid agreement and the indebtedness represented therby [sic] will, on or after 08-18-84 make one or more private sales or other dispositions of our right, title and interest in and to the goods described in said agreement, which goods may be described as follows:
>
> ONE WHITE 9700 COMBINE S/N 97-20218 W/CORNHEAD S/N A90065, AND KWICK CUT HEAD S/N 912118
>
> The net proceeds of sale (less expenses incurred) shall be, in accordance with said agreement, applied to the reduction of total obligation due and owing by Debtor to the undersigned secured party.
>
> Dated this 7TH day of AUGUST, 1984.
>
> Deutsche Credit Corporation

The equipment was sold at private sale on October 3, 1984, for $28,800. This action for deficiency involves the principal balance of $35,154.24 remaining due under the installment sales contract and security agreement after application of the net proceeds of the sale.

Neb. U.C.C. § 9-504(1) (Reissue 1980) provides that after default a secured party may sell the collateral. Section 9-504(3) provides for the disposition of the collateral by public or private sale and, with certain exceptions not relevant to the present

inquiry, requires that reasonable notice of the sale be sent by the secured party to the debtor. A guarantor, being one "who owes payment or other performance of the obligation secured," has been held to be a "debtor" as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980), and thus entitled to notice. *Allis-Chalmers Corp. v. Haumont*, 220 Neb. 509, 371 N.W.2d 97 (1985).

The guarantors contend the trial court correctly determined they were not given notice. In so arguing they place heavy reliance upon this court's recent opinion in *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983).

In *Hughes*, Vernor L. Hughes and his wife, Diana L. Hughes, were corporate officers of Central Auto & Truck Supply, Inc. The bank's loan to Central Auto was evidenced by a promissory note and by a security agreement tying the loan to the security of the assets of Central Auto. The loan, promissory note, and security agreement were executed by Central Auto through Mr. Hughes, its president. On the same date the loan was made, Mr. and Mrs. Hughes both executed and delivered a personal guaranty for the corporate debt. Default subsequently occurred, and Central Auto filed a bankruptcy proceeding. The trustee in bankruptcy abandoned the secured assets of Central Auto, and the bank obtained possession of them. The bank then sent a letter to the Hughes residence, reading as follows:

> Mr. Venor [sic] Hughes, President
> Central Auto & Truck Supply
> 1558 East 5th
> Fremont, NE. 68025
>
> RE: Loan #869930
> Collateral: Financing Statement 5-9-74
>
> Dear Mr. Hughes:
>
> This is to notify you that, in connection with the repossession of the above collateral involved in the abovee [sic] account, you may redeem said collateral and terminate the contract relating thereto by payment of $51,417.90 plus interest and expenses any time prior to the sale of said collateral on the date designated below. It is possible for this sum to increase should further expenses

of any nature be incurred by our bank.

In the event you are not able to fully redeem the collateral or make suitable arrangements for redemption, the collateral will be sold at private sale on or after April 10, 1981 at the present place of storage which is 245 East 5th St., and First National Bank & Trust Company of Fremont.

Local, State and Federal laws permitting, you will be held liable for any deficiency declared owing after disposal of this collateral.

Hughes at 44-45, 332 N.W.2d at 676.

In resolving the case we said:

> The [above] notice in this case makes no reference to the guaranty; indeed, it makes reference only to the "Financing Statement 5-9-74," in fact a security agreement dated May 24, 1974, a document which was signed individually by neither Mr. Hughes nor Mrs. Hughes. In that regard the notice fails to apprise either Mr. or Mrs. Hughes that a personal deficiency judgment might be sought against any one of them in his or her capacity as guarantor of the corporation's debt. Secondly, as between Mr. Hughes and Central Auto, the matter as to whom the notice was sent is ambiguous. The interest of Mr. Hughes in this context conflicts with that of the corporation. It cannot be said that the notice, as addressed, unmistakably advises Mr. Hughes personally that he is the "you" who may be held "liable for any deficiency declared owing after disposal of this collateral." To assume that Mr. Hughes would know that a deficiency could not be obtained against the bankrupt Central Auto is to assume something not supported by the record before us. Although the statement that ambiguous language is to be construed against the drafter of the language is generally applied in the case of insurance policies, *Niemeyer v. Estate of Tichota*, 191 Neb. 484, 215 N.W.2d 885 (1974), the reasoning behind that rule is equally applicable to notices of the nature involved here.

Hughes at 46-47, 332 N.W.2d at 677. We thus determined that the Hugheses had not received notice and that the trial court

was therefore correct in dismissing the bank's petition at the close of the bank's evidence.

The guarantors contend that the notices in the present case are indistinguishable from the notice in *Hughes*. Plaintiff argues that, on the contrary, its notices are different from the notice in *Hughes* in several important respects. First of all, while in *Hughes* there was but a single notice, in the present case each of the guarantors was sent a separate notice. While the notice in *Hughes* was addressed to the president of the corporate debtor, each of the notices to the guarantors in this case was addressed to a guarantor individually, and no reference was made to the guarantor's capacity as an officer of the corporate debtor. While the notice in *Hughes* directed specific attention to "Collateral: Financing Statement 5-9-74," which the guarantor had not signed, the notices in this case directed attention to the entire "HI-BO FARMS INC." transaction. Plaintiff concludes that these distinctions are such that the guarantors had no reasonable basis to conclude that the notices were sent to them in their capacity as corporate officers rather than to them in their own individual capacities.

The guarantors, on the other hand, point to the facts that, as did the notice in *Hughes*, the notices in this case refer only to Hi-Bo Farms as the debtor. Moreover, as the notice in *Hughes* failed to make any reference to the guaranties executed by the Hugheses, so in this case did the notices limit themselves to the "default under the terms and provisions of a security agreement executed by the captioned Debtor . . . ." Thus, the guarantors argue that the notices are, at best, ambiguous and, as such, constitute no notice at all insofar as they individually are concerned.

We conclude that the notices are ambiguous as a matter of law with respect to the guarantors. They refer to but a single debtor, Hi-Bo Farms, and refer only to the security agreement executed by that debtor solely. That ambiguity is to be resolved against plaintiff as the drafter of the notices. *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983).

That being so, the only question remaining is whether a summary judgment in favor of the guarantors and against plaintiff should have been entered.

Summary judgment is to be granted to the moving party where there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and the moving party is entitled to judgment as a matter of law. In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence. The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; that party must therefore produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. *Carlson v. Waddle*, 223 Neb. 671, 392 N.W.2d 777 (1986); *Draemel v. Rufenacht, Bromagen & Hertz, Inc.*, 223 Neb. 645, 392 N.W.2d 759 (1986); *Cornhusker Agrl. Assn. v. Equitable Gen. Ins. Co.*, 223 Neb. 618, 392 N.W.2d 366 (1986); Neb. Rev. Stat. § 25-1332 (Reissue 1985).

Since the notices are ambiguous as a matter of law and since as a matter of law the ambiguity must be resolved against plaintiff and in favor of the guarantors, the situation is, as the guarantors argue, as if no notice whatsoever had been sent to them. Under that circumstance there exists no genuine issue as to any material fact or as to the inferences to be drawn therefrom, and the guarantors are entitled to judgment as a matter of law. Consequently, the trial court was correct in sustaining the guarantors' motion for summary judgment, resulting in a dismissal of plaintiff's action as to the guarantors.

AFFIRMED.

KRIVOSHA, C.J., not participating.

BOSLAUGH, J., dissenting.

Except in certain circumstances, Neb. U.C.C. § 9-504(3) (Reissue 1980) requires that a secured party give "reasonable notification" of the time after which any private sale is to be made. In comment 5 of the 1972 comments to § 9-504, it is stated: " 'Reasonable notification' is not defined in this Article; at a minimum it must be sent in such time that persons entitled to receive it will have sufficient time to take appropriate

steps to protect their interests by taking part in the sale or other disposition if they so desire."

Consistent with this commentary, we have recognized that the purpose underlying the § 9-504(3) notice requirements is to ensure that a debtor entitled to notice at least has an opportunity to protect his interests, whether by redemption, finding prospective purchasers for the collateral, or otherwise. *City Bank & Trust Co. v. Van Andel*, 220 Neb. 152, 368 N.W.2d 789 (1985); *Havelock Bank v. McArthur*, 220 Neb. 364, 370 N.W.2d 116 (1985). In other words, the purpose of the statutory notice is to inform the debtor that the collateral is about to be sold to satisfy all or a part of the debt.

Clearly, a guarantor is entitled to notice as a debtor under § 9-504(3). *Allis-Chalmers Corp. v. Haumont*, 220 Neb. 509, 371 N.W.2d 97 (1985). But saying that a guarantor is entitled to notice as a debtor provides no justification for requiring that the guarantor be notified with more specific information than the primary obligor.

In previous cases not involving notice to guarantors, we have indicated that the only notice required by § 9-504(3) as to a private sale is written notice of the time after which the collateral will be sold. *Citizens State Bank v. Sparks*, 202 Neb. 661, 276 N.W.2d 661 (1979); *Contois Motor Co. v. Saltz*, 198 Neb. 455, 253 N.W.2d 290 (1977).

The U.C.C. is recognized by several courts to embody a general scheme which makes distinctions along functional, rather than formal, lines. See, *MBank Dallas, N.A. v. Sunbelt Mfg., Inc.*, 710 S.W.2d 633 (Tex. App. 1986); *Chase Manhattan Bank, N.A. v. Natarelli*, 93 Misc. 2d 78, 401 N.Y.S.2d 404 (1977). If the notices in this case served their purpose, they should have been held to satisfy the requirements of § 9-504(3). There seems to be no question but that the notices here met the express statutory requirements and gave the guarantors sufficient time to protect their interests. Thus, it would seem that the notices were sufficient.

In *Reeves v. Habersham Bank*, 254 Ga. 615, 331 S.E.2d 589 (1985), the court rejected the argument of three guarantors who claimed that they had not received reasonable notice as required by the Georgia equivalent to § 9-504(3). The guarantors based

their argument on the fact that the notice had been sent to them because of their status as secondary lienholders on the collateral, and not because of their status as debtors. In rejecting this argument the court reasoned that the notice was adequate because it afforded the guarantors an opportunity to take steps to protect their interests. Similar logic should apply in the present case.

The general purpose of the U.C.C., including article 9, "is to simplify, clarify and modernize the law governing commercial transactions . . . ." *Natarelli, supra* at 87, 401 N.Y.S.2d at 410. Our decisions run contrary to that purpose by creating numerous traps and pitfalls for the unwary creditor. The majority opinion seems to indicate that the notice must include legal advice to the debtor as to why he may be liable for a deficiency. What ought to be a simple procedure has become a highly technical matter in which skilled legal advice is necessary to avoid disaster.

The present case is distinguishable on its facts from *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983). In the *Hughes* case the single letter of notice sent was addressed to one of the guarantors in his corporate capacity in the debtor corporation. An ambiguity arose from the fact that the addressee's interest as a coguarantor was in direct conflict with that of the debtor corporation as primary obligor. In the present case the individual guarantors each received a letter of notification which made no reference to their corporate capacities. Thus, the ambiguity in the *Hughes* case was not a factor here.

The fact that the notices in this case failed to refer to the guaranty agreements should not affect the result. A person who voluntarily signs a guaranty for the debt of another should be expected to know that if any part of the debt is not paid he will be liable for all or part of the deficiency. I would not have affirmed the judgment.

DONALD HOLDEN AND KAREN HOLDEN, APPELLANTS, V. DIANA URBAN, APPELLEE.

398 N.W.2d 699

Filed January 2, 1987. No. 85-875.

1. **Pleadings.** Proper pleading requires a petition to state in logical and legal form the facts which constitute the plaintiff's cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute.
2. **Pleadings: Appeal and Error.** The Supreme Court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried.
3. **Appeal and Error.** In the absence of plain error, where an issue is raised for the first time in the Supreme Court, such issue will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition.
4. **Courts: Judgments: Appeal and Error.** On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the case for error appearing on the record made in the county court.
5. **Judgments: Appeal and Error.** A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous.
6. **Negligence: Proof: Evidence.** One alleging negligence has the burden to prove such negligence. Establishing that an accident has occurred does not prove a case of negligence. Negligence is not presumed and must be proved by evidence, direct or circumstantial.
7. **Negligence.** For actionable negligence, there must be a defendant's legal duty to protect the plaintiff from injury, a failure to discharge that duty, and damage resulting from such undischarged duty.
8. _____. Foreseeability is a factor in establishing a defendant's duty.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Roger R. Holthaus, for appellants.

David J. Kolenda, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Donald and Karen Holden appeal the judgment of the district court for Sarpy County, reversing and vacating their judgment for $1,140.13 obtained in a county court bench trial on their claim for property damage caused by negligence of

Diana Urban. We affirm.

Holdens and Urbans lived across the street from each other on 70th Street in LaVista, Nebraska. Urbans' residence was on the west side of 70th and had a driveway with a 30° grade, sloping toward the street. Directly opposite Urbans' driveway was the level driveway for the Holden residence, on the east side of 70th.

Diana Urban parked her El Camino in the Urban driveway and left the car keys on the dashboard of the unlocked vehicle, but could not recall whether she applied the automobile's emergency brake. Immediately adjacent to the garage attached to the Holden house was a parked 1958 Buick Roadmaster series 75 V-8 four-door sedan. To the rear and west of the Buick was a trailer, converted from the box of a Ford pickup.

On hearing a "loud crash" and believing a tree had fallen on her house, Karen Holden rushed from inside the house and saw the stationary El Camino partly in the street and partly in Holdens' driveway. Inside Diana's vehicle was 4-year-old Kari Urban, huddled in the front seat and crying. Karen Holden further observed that the trailer had been propelled into the trunk of the Buick, which, in turn, had collided with the corner of Holdens' garage. Diana Urban was running across the street to Holdens' and, on discovering Kari in the car, apologized for the vehicular misadventure. This incident was the first that Karen Holden had spoken to Diana Urban.

In their second amended petition Holdens alleged Diana Urban's specific negligence, namely, Diana Urban had "improperly" parked her automobile or was guilty of "negligent supervision of her four year old daughter," and requested damages for their trailer, Buick, and garage. On judgment for Holdens ($1,140.13), Diana Urban appealed to the district court, which found that the "judgment of County Court [is] erroneous as a matter of law, should be vacated and set aside." Holdens contend that the district court judgment is erroneous as a matter of law.

Holdens argue: "If this is not a true case of res ipsa loquitur, it comes very close to it." Brief for Appellants at 4. However, Holdens' petition also speaks for itself. The case was tried on Holdens' allegations of Diana Urban's specific acts of

negligence. " 'Proper pleading requires a petition to state in logical and legal form the facts which constitute the plaintiff's cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute.' " *League v. Vanice*, 221 Neb. 34, 43, 374 N.W.2d 849, 855 (1985). See, also, *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984). The Supreme Court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried. *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985). In the absence of plain error, where an issue is raised for the first time in the Supreme Court, such issue will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition. *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985). Consequently, we dispose of Holdens' appeal on the basis of the specific acts of negligence alleged by Holdens.

On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the "case for error appearing on the record made in the county court." Neb. Rev. Stat. § 24-541.06 (Reissue 1985). A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous. Cf. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

One alleging negligence has the burden to prove such negligence. Establishing that an accident has occurred does not prove a case of negligence. See, *Himes v. Carter*, 219 Neb. 734, 365 N.W.2d 840 (1985); *Porter v. Black*, 205 Neb. 699, 289 N.W.2d 760 (1980). Negligence is not presumed and must be proved by evidence, direct or circumstantial. *Himes v. Carter, supra; Porter v. Black, supra.*

For actionable negligence there must be a defendant's legal duty to protect the plaintiff from injury, a failure to discharge that duty, and damage resulting from such undischarged duty. See, *Daniels v. Andersen*, 195 Neb. 95, 237 N.W.2d 397 (1975); *Floridia v. Farlee*, 201 Neb. 39, 266 N.W.2d 204 (1978).

> "[D]uty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff;

> and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. . . .
>
> A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.

Prosser and Keeton on the Law of Torts, *Limited Duty* § 53 at 356 (5th ed. 1984).

Foreseeability is a factor in establishing a defendant's duty, or, as expressed by Justice Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 394, 111 N.E. 1050, 1054 (1916): "[F]oresight of the consequences involves the creation of a duty . . . ." See, also, *Lock v. Packard Flying Service, Inc.*, 185 Neb. 71, 73, 173 N.W.2d 516, 518 (1970): " 'Foresight, not retrospect, is the standard of diligence. . . .' " (Citing and quoting from *Kolar v. Divis*, 179 Neb. 756, 140 N.W.2d 658 (1966).)

Applying the aforementioned principles to Holdens' case, there is no evidence that the Urban vehicle was insecurely parked. Diana Urban's inability to recollect her application of the El Camino's emergency brake does not carry the day on Holdens' specification that Diana's car had been "improperly" parked. Holdens failed to prove negligence on the part of Diana Urban in parking her automobile. Concerning Holdens' allegation of negligence regarding "supervision" of 4-year-old Kari, Holdens, again, have failed to prove their specification of Diana Urban's negligence. How did Kari come to be in Diana's parked car? Although Diana Urban left her automobile unlocked and unattended, there is no evidence establishing Kari's presence in the automobile when Diana Urban left her car unattended. If Kari was outside the car when Diana Urban left the vehicle, Holdens' evidence fails to establish that, under the circumstances, Diana Urban should have foreseen Kari's presence in proximity to the unattended vehicle and Kari's opportunity and ability to enter the accessible automobile. Kari's presence in the car after the collision is insufficient proof to establish any negligence of Diana Urban in relation to Kari and the unattended vehicle.

As a matter of law, Holdens have failed to prove Diana Urban's negligence in accordance with their specifications. Consequently, the county court's finding that Diana Urban was negligent is clearly erroneous. The district court's judgment is correct and, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD STEELE, APPELLANT.
399 N.W.2d 267

Filed January 2, 1987. No. 86-238.

1. **Criminal Law: Statutes.** Penal statutes are to be strictly construed, and it is not for us to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.
2. **Statutes.** A provision of a statute which does not relate to the essence of the thing to be done but governs the time or manner of performance is generally considered to be directory as opposed to mandatory.
3. **Mental Health: Final Orders: Appeal and Error.** This court will not interfere on appeal with a final order made by the district court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

William G. Line of Kerrigan, Line & Martin, for appellant.

Robert M. Spire, Attorney General, Dale D. Brodkey, and William L. Howland, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal from the district court for Dodge County. Appellant, Ronald Steele, was charged by information with possession of a short shotgun in violation of Neb. Rev. Stat. § 28-1203 (Reissue 1985), and with being a felon in possession

of a firearm in violation of Neb. Rev. Stat. § 28-1206 (Reissue 1985). Appellant was found to be not responsible by reason of insanity. The facts relevant to this appeal are as follows.

Steele entered a plea of not responsible by reason of insanity, was so adjudged, and was committed to the Lincoln Regional Center pursuant to Neb. Rev. Stat. § 29-3701 (Reissue 1985) for a 90-day evaluation period. Although the appellant was committed on November 8, 1985, he was not actually admitted to the center until November 15. The report required by statute was prepared on February 6, 1986, and sent to the court on February 10. The hearing required by Neb. Rev. Stat. § 29-3702 (Reissue 1985) was provided the appellant on February 18, 1986, at which Steele was found by clear and convincing evidence to be dangerous to himself and others and was committed to the Lincoln Regional Center. His annual review provided for under Neb. Rev. Stat. § 29-3703(1) (Reissue 1985) is set for February 2, 1987.

The appellant assigns error to the failure of the district court to meet the statutory time limits under §§ 29-3701 and 29-3702. Specifically, the appellant assigns error to the lower court's failure to provide him an evidentiary hearing prior to the expiration of the 90-day evaluation period. The appellant also assigns error to the failure of the hospital and the court to provide and review the report of the examining psychiatrists at the Lincoln Regional Center 10 days prior to the expiration of the 90-day evaluation period. Steele's second assignment of error centers around the finding of the district court that he is dangerous to himself and others. The appellant contends that there is insufficient evidence to support such a finding. Steele contends that as a result of the above-claimed errors, the court has lost jurisdiction of the appellant and he must be released from the Lincoln Regional Center. We affirm the district court.

Section 29-3701(1) provides as follows:

> Following receipt of a verdict of acquittal on grounds of insanity, the court shall forthwith conduct a hearing to determine whether there is probable cause to believe the person is dangerous to himself, herself, or others by reason of mental illness or defect, or will be so dangerous in the foreseeable future, as demonstrated by an overt act

> or threat. If the court finds probable cause, the court shall determine whether and under what conditions of confinement the acquitted person should be committed to a regional center or other appropriate facility for a period not to exceed ninety days for an evaluation of the person's mental condition and for the preparation of a treatment plan pursuant to subsection (4) of this section. When the court commits the person for evaluation, the court shall specify all conditions of the person's confinement during the evaluation including, but not limited to, all circumstances under which the person may leave a locked facility at the place of confinement. The order of commitment specifying the conditions of confinement shall include a finding by the court that any freedom of movement accorded the person outside a locked facility is consistent with the safety of the public.

The appellant argues that the evaluation of his mental health was not provided to the court within 10 days prior to the expiration of the 90-day evaluation period and that his evidentiary hearing was not provided before the expiration of the evaluation period. The appellant bases his argument upon the contentions that the language of the statutes which govern this case is mandatory and that the failure of the court to follow the statutorily set guidelines should result in the appellant's release. We disagree.

First, we find no announced penalty in the statute or the case law interpreting the statute for the State's failure to meet the statutory time limits. The appellant gives no support for his contention that the remedy is dismissal and loss of jurisdiction. Looking to analogous statutes, we note that Neb. Rev. Stat. §§ 29-1205 et seq. (Reissue 1985), the Nebraska speedy trial statutes, provide for the sanction of dismissal if the defendant is not brought to trial within the 6 months provided by statute. We note that no such sanction is provided by the statutes governing acquittals on the ground of insanity.

Penal statutes are to be strictly construed, and it is not for us to supply missing words or sentences to make clear that which is indefinite, or, as in this case, to supply that which is not there. *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986). See,

also, *In re Interest of S.S.L.*, 219 Neb. 911, 367 N.W.2d 710 (1985), where this court held that the failure of a sheriff to immediately serve parents with notice that their child had been taken into custody, Neb. Rev. Stat. § 43-250 (Reissue 1984), and the failure of the Department of Social Services to file a petition within 48 hours after taking custody of the child, Neb. Rev. Stat. § 43-275 (Reissue 1984), did not deprive the court of jurisdiction absent direct statutory language to that effect.

The appellant bases his contentions on the language of §§ 29-3701 and 29-3702, which he maintains is mandatory, and asserts that a failure to follow the time limits set out in the statutes requires discharge. Section 29-3702 provides: "Prior to the expiration of the evaluation period provided for in section 29-3701, the court shall conduct an evidentiary hearing regarding the condition of the person . . . ." Section 29-3701(5) provides in relevant part: "Such evaluation and treatment plan shall include the facts upon which conclusions stated therein are based and shall be received by the court at least ten days prior to the expiration of the evaluation period."

The appellant relies upon the case of *State v. Stratton,* 220 Neb. 854, 374 N.W.2d 31 (1985). In *Stratton* this court construed a statute which required the sentence imposed on one convicted of violating Neb. Rev. Stat. § 28-1205 (Reissue 1985), using a firearm to commit a felony, to be served consecutively to any other sentence imposed for another felony conviction as mandatory. There, we stated that the word "shall" in that statute constituted a mandate, as opposed to a directive, to consecutive sentencing.

The statute in *Stratton* differs significantly from the statutes involved in this case. The portions of §§ 29-3701 and 29-3702 which were not complied with were merely the portions of those statutes which govern the time by which the report must be submitted to the court and the time by which evidence must be provided on the subject being evaluated. In *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 249 N.W.2d 468 (1977), this court distinguished between provisions of statutes which govern the essence of the thing to be done and those provisions of a statute which govern or direct the time or the method of the thing to be done. As stated in *Hartman* at

371-72, 249 N.W.2d at 475,

> "Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory. . . . Provisions governing the time for doing an act, or directing the doing of certain things within certain times without any negative words restraining the doing thereof afterward, are deemed to be directory."

The statute involved in *Hartman* required that the Public Service Commission have a decision within 30 days of a hearing. The decision at issue in *Hartman* was not on file at the expiration of the 30-day period. There, we held that the 30-day limit was not a mandate, but a directive. The language of the statute provides that except for a showing of good cause, "a decision of the commission *shall* be made and filed within thirty days after completion of the hearing or after submission of affidavits in nonhearing proceedings." (Emphasis supplied.) See Neb. Rev. Stat. § 75-128 (Reissue 1986).

In the case of *Taylor v. Department of Transp.*, 260 N.W.2d 521 (Iowa 1977), the appellant requested a hearing after the revocation of his driver's license. Iowa Code Ann. § 321B.26 (West 1985) provides that such hearing shall be held within 20 days of the request. The appellant was not given a hearing within the statutory time limits and contended that the trial court and the Department of Transportation had lost jurisdiction as a result. The Iowa court stated at 523:

> Nevertheless, the time provision in § 321B.8 [now 321.B26] is clearly designed to provide order and promptness in the administrative process, the characteristic purpose of a directory statute. The main legislative goal of removing dangerous drivers from the highways can still be attained when hearings are late. In the absence of a showing of prejudice by the licensee, a failure to hold the revocation hearing within 20 days of receipt should not preclude a later hearing. We hold that the hearing time provision of § 321B.8 is directory and not

mandatory.

The Iowa court went on to say that statutes which fix the form, mode, or time of performance by public functionaries are generally considered to be directory, as opposed to mandatory.

Clearly, there are factual differences between these cases. However, the failure of the lower court in this case to meet the time limit set out in § 29-3701 or § 29-3702 was not a violation of a mandatory provision, as was the case in *Stratton*, but a violation of provisions of the statutes which governed the time in which the report was to be delivered to the court and the time by which an evidentiary hearing was to be provided. Appellant was given an evidentiary hearing, and a report was delivered to the court. We find no prejudice to the appellant, and this assignment of error does not support the appellant's contention that he should be released from the Lincoln Regional Center. This assignment of error is without merit.

Appellant's second assignment of error contends that there was insufficient evidence to justify his commitment to the Lincoln Regional Center. In his brief Steele alleges he committed no overt act sufficient to meet the clear and convincing evidence standard for commitment. We disagree. Here, as we have often stated, the rule in regard to the "clear and convincing standard" in a civil mental health commitment proceeding has been established. "This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof." *State v. Mayfield*, 212 Neb. 724, 727, 325 N.W.2d 162, 164 (1982); *State v. Simants*, 213 Neb. 638, 330 N.W.2d 910 (1983).

While in possession of a short shotgun, Steele was found walking around his son's school. He stated he had come to say goodbye to his son before killing himself. The reports of the several psychiatrists that have examined the appellant have concluded that Steele is insane, suffering from alcoholism, is paranoid, and has delusions and hallucinations. The opinion of Dr. Woytassek of the Lincoln Regional Center is that Steele was dangerous to himself and others. Clearly, it cannot be said that, as a matter of law, the trial judge was incorrect in his finding

that the appellant was dangerous to himself and others. This assignment of error is also without merit. We affirm the findings and order of the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALAN W. FRIES, JR., APPELLANT.

398 N.W.2d 702

Filed January 2, 1987. No. 86-339.

1. **Postconviction: Appeal and Error.** To obtain postconviction relief the defendant has the burden of proof to establish the grounds for such relief, and the findings of the district court will not be disturbed on appeal unless clearly erroneous.
2. **Postconviction: Effectiveness of Counsel: Proof.** To establish ineffectiveness of counsel as a ground for postconviction relief, the defendant must prove that his counsel failed to perform at least as well as an attorney in the area with ordinary training and skill in the criminal law.
3. **Attorney and Client: Effectiveness of Counsel.** It is the duty of defense counsel to represent their clients in a manner consistent with the prevailing professional standard within their community. Implicit in that duty is a duty to conscientiously protect the interests of the client—a duty which is an integral part of every attorney-client relationship.
4. **Postconviction: Effectiveness of Counsel: Proof.** To obtain postconviction relief on the ground of ineffectiveness of counsel, the defendant must show that counsel's action or inaction prejudiced the defense of the case and that there is a reasonable probability that, but for counsel's errors, the result of the case would have been different.
5. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness is a matter of trial strategy. Even if that choice proves ineffective, it will not, without more, sustain a finding of ineffectiveness of counsel.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Mark W. Bubak, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

The defendant was convicted in 1982 of 27 counts of violating Nebraska laws regulating the registration and sale of securities. He was sentenced to imprisonment to three consecutive terms of 16 months to 5 years on the first three counts and to terms of 16 months to 5 years on the remaining counts, to be served concurrently with the sentence on count III. The judgment was affirmed in *State v. Fries,* 214 Neb. 874, 337 N.W.2d 398 (1983).

On May 21, 1985, the defendant petitioned for postconviction relief. After an evidentiary hearing on December 18, 1985, the district court denied the requested relief. From that order the defendant has appealed.

The defendant has assigned as error the trial court's finding that he was not denied effective assistance of counsel at trial. The defendant contends his counsel were ineffective because they failed to employ an expert in securities law to properly advise the defendant and to rebut the State's expert witness. The defendant argues that a competent criminal defense attorney would have employed such an expert and that had such an expert been employed, the outcome of the trial could have been different.

To obtain postconviction relief the defendant has the burden of proof to establish the grounds for such relief, and the findings of the district court will not be disturbed on appeal unless clearly erroneous. *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984); *State v. Paulson*, 211 Neb. 711, 320 N.W.2d 115 (1982).

The standard by which this court determines whether a defendant in a criminal trial has been afforded effective assistance of counsel has been stated in various forms. In *State v. Leadinghorse*, 192 Neb. 485, 489, 222 N.W.2d 573, 577 (1974), we stated, "Our present test would be that trial counsel perform at least as well as a lawyer with ordinary training and

skill in the criminal law in his area, and that he conscientiously protect the interests of his client." This was consistently utilized until *State v. Otey*, 212 Neb. 103, 321 N.W.2d 453 (1982). In *Otey* we stated that, to determine the effectiveness of counsel, we would employ a two-part test: first, whether the lawyer performed at least as well as an attorney in the area with ordinary training and skill in the criminal law; and, second, whether the attorney conscientiously protected the interests of his client. In addition, the defendant had to show that the attorney's action or inaction caused the defendant to suffer prejudice in the defense of his case.

The *Otey* test required the defendant to prove both parts of the test to establish ineffective assistance of counsel. It has been employed by this court in numerous cases. See, e.g., *State v. Birge*, 223 Neb. 761, 393 N.W.2d 713 (1986); *State v. Brown*, 220 Neb. 305, 369 N.W.2d 639 (1985); *State v. Pearson*, 220 Neb. 183, 368 N.W.2d 804 (1985); *State v. Manchester*, 220 Neb. 41, 367 N.W.2d 733 (1985); *State v. Harper*, 218 Neb. 870, 359 N.W.2d 806 (1984); *State v. Clark*, 216 Neb. 49, 342 N.W.2d 366 (1983).

The *Otey* two-part test was given a slightly different, yet unexplained, articulation in *State v. Crouch*, 215 Neb. 205, 337 N.W.2d 766 (1983). In *Crouch* it was stated that to establish a right to postconviction relief the defendant had to prove that counsel had failed to perform at least as well as an attorney in the area with ordinary training and skill in the criminal law, *or* had failed to conscientiously protect the defendant's interest. Some subsequent postconviction relief cases followed this articulation of the test. See, e.g., *State v. Bradford*, 223 Neb. 908, 395 N.W.2d 495 (1986); *State v. Andrews*, 223 Neb. 830, 394 N.W.2d 638 (1986); *State v. Isikoff*, 223 Neb. 679, 392 N.W.2d 738 (1986); *State v. Hochstein, supra.*

A third statement of the test recently emerged in *State v. Grotzky*, 222 Neb. 39, 382 N.W.2d 20 (1986). There, the standard was stated to be whether counsel performed at least as well as an attorney in the area with ordinary training and skill in the criminal law. The second part of the test, that of conscientiously protecting the interests of the defendant, was not mentioned. Several recent cases have utilized this

articulation of the standard. See, e.g., *State v. Meis*, 223 Neb. 935, 395 N.W.2d 509 (1986); *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986); *State v. Apodaca*, 223 Neb. 258, 388 N.W.2d 837 (1986).

While these three articulations apparently differ, the differences are more semantic than substantive. Essentially, the applicable standard is whether the attorney performed at least as well as an attorney in the area with ordinary training and skill in the criminal law. This standard imposes upon attorneys the duty to represent criminal clients in a manner consistent with the prevailing professional standard within their community. Implicit in that duty is a duty to conscientiously protect the interests of the client—a duty which is an integral part of every attorney-client relationship. See Canon VI, EC 6-4, Code of Professional Responsibility. The most recent cases interpreting this standard have recognized the test really has but one part, and accurately reflect the standard by which effectiveness of counsel in a criminal case is to be determined. This requirement is consistent with the test imposed by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and by the U.S. Court of Appeals for the Eighth Circuit in *Morrow v. Parratt*, 574 F.2d 411 (8th Cir. 1978).

In addition to showing the attorney failed to perform as required, the defendant must show, on the record, that counsel's action or inaction prejudiced the defense of the case. *State v. Otey*, 212 Neb. 103, 321 N.W.2d 453 (1982). The defendant must establish there is a reasonable probability that, but for counsel's errors, the result of the case would have been different. *State v. Pearson, supra*. See, also, *Strickland v. Washington, supra*. The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffectiveness of counsel. *State v. Poe*, 214 Neb. 540, 334 N.W.2d 642 (1983). See, also, *State v. Andrews, supra*.

The defendant contends that counsel's failure to call an expert witness constituted ineffective counsel. There is no showing on the record of how such inaction prejudiced the

defense or that had such an expert been called, a different result probably would have followed.

The record is silent as to the type of testimony such an expert could have provided. Instead, the record discloses that the decision not to call an expert witness was carefully made and based on trial strategy. One of defendant's counsel testified that it was his belief that an expert witness could have been more detrimental than beneficial to the defendant's case. Both counsel testified that they considered and decided against obtaining an expert. The fact that the strategy proved unsuccessful does not sustain a finding of ineffectiveness of counsel. *State v. Poe, supra.*

The trial court's finding is supported by the record and was not clearly erroneous. The order denying postconviction relief is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ABE CLARK LYTLE, APPELLANT.

398 N.W.2d 705

Filed January 2, 1987. No. 86-491.

1. **Postconviction.** An evidentiary hearing on a motion for postconviction relief is not required when the motion, files, and records of the case show that the defendant is not entitled to relief.
2. _____. An applicant proceeding under the Postconviction Act (Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985)) must allege facts amounting to a violation or infringement of constitutional rights, and the pleading of mere conclusions of fact or of law is not sufficient to require the court to grant an evidentiary hearing.
3. **Postconviction: Effectiveness of Counsel: Proof.** When a defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.

4. **Postconviction.** Postconviction motions cannot be used to obtain a further review of issues already litigated.
5. **Effectiveness of Counsel.** In claiming ineffective assistance of counsel because counsel failed to obtain a plea concession, the defendant must allege facts which, if true, would establish that such a plea negotiation was reasonably possible.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Abe Clark Lytle, pro se.

Robert M. Spire, Attorney General, and James H. Spears, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Defendant appeals orders of the district court for Douglas County denying his request for postconviction relief and an evidentiary hearing thereon, and denying his motion for rehearing and to allow the filing of an amended petition. We affirm.

Following a jury trial in the district court, defendant was convicted of first degree murder arising out of a purse snatching and assault under the felony murder rule. He was sentenced to imprisonment for life. He appealed his conviction, which was affirmed in *State v. Lytle*, 194 Neb. 353, 231 N.W.2d 681 (1975).

Defendant on his own behalf filed a motion for postconviction relief alleging ineffective assistance of counsel. The district court refused to grant an evidentiary hearing and denied the motion. The defendant then moved for a rehearing and requested leave to file an amended petition. The court denied the motion. Defendant appeals.

The defendant contends that the district court abused its discretion when it (1) refused to grant an evidentiary hearing, (2) denied his motion for postconviction relief, and (3) denied his motion for a rehearing and leave to file an amended petition.

Referring to the first of the defendant's claims, it is well established that an evidentiary hearing on a motion for

postconviction relief is not required when the motion, files, and records of the case show that the defendant is not entitled to relief. *State v. Bradford*, 223 Neb. 908, 395 N.W.2d 495 (1986). Although the defendant's petition is somewhat unclear, it appears he is claiming he was denied effective assistance of counsel for two reasons: first, defense counsel failed to make "faithful attempts at plea-negotiations"; and, second, counsel did not raise the issue of the defendant's illegal arrest until the direct appeal of the case to this court, thereby precluding review of that issue.

In denying an evidentiary hearing on the first of those claims of ineffective assistance of counsel, the district court ruled the defendant had not alleged sufficient specific facts to make a preliminary determination that a hearing was justified on that question. We agree.

An applicant proceeding under the Postconviction Act (Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985)) must allege facts amounting to a violation or infringement of constitutional rights, and the pleading of mere conclusions of fact or of law is not sufficient to require the court to grant an evidentiary hearing. *State v. Bradford, supra*. When the defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions. *State v. Fries, ante* p. 482, 398 N.W.2d 702 (1987); *State v. Meis*, 223 Neb. 935, 395 N.W.2d 509 (1986).

The essence of the defendant's allegation regarding defense counsel's failure to negotiate a plea is that, given the evidence against the defendant, the only way counsel could have conscientiously protected the defendant's interest would have been for counsel to have informed the defendant of the nature of the felony murder rule and the trial risks attendant thereto, and then to have negotiated a plea bargain with the prosecution. Such allegations are mere conclusions, not factual

allegations constituting an infringement of the defendant's right to effective assistance of counsel. As such, an evidentiary hearing on that issue was properly denied.

In denying an evidentiary hearing on the second of defendant's claims of ineffective assistance of counsel, the district court ruled that the issue of the legality of the defendant's arrest had already been reviewed on direct appeal and therefore could not be brought up again in the motion for postconviction relief. Again, we agree with the ruling of the district court.

Postconviction motions cannot be used to obtain a further review of issues already litigated. *State v. Evans, ante* p. 64, 395 N.W.2d 563 (1986). Although on direct appeal we determined that the issue of probable cause for the defendant's arrest was not raised in the district court and therefore not properly before us, we did go on to determine that probable cause for the arrest existed. *State v. Lytle*, 194 Neb. 353, 231 N.W.2d 681 (1975). Inasmuch as that issue was actually reviewed by this court, it cannot be the subject of an ineffective assistance of counsel claim in a subsequent motion for postconviction relief.

Because we agree that the district court properly denied an evidentiary hearing on the defendant's motion for postconviction relief in that the motion did not show the defendant was entitled to relief, it logically follows that we also approve of the district court's denial of the motion itself. Thus, the defendant's second contention of abuse of discretion on the part of the district court is without merit.

That brings us to the defendant's final contention—that the district court abused its discretion in denying the defendant's motion for a rehearing and for leave to file an amended complaint. The defendant submitted an affidavit supporting his motion in which he stated his amended complaint would show that (1) counsel's action led him to believe a plea negotiation was his sole option, (2) counsel led defendant's family to believe counsel was seeking plea negotiations, (3) counsel's actions before and during trial led defendant to believe that the State was pursuing a second degree murder charge, and (4) counsel's action and discussions with the

defendant's parents led them to believe that the defendant would be convicted of second degree murder. Considering this affidavit, the district court denied the defendant's motion for a rehearing and leave to file an amended petition.

Although defendant made his allegations of ineffective assistance of counsel more fact specific, he still failed to present any facts as to whether a plea negotiation was even possible given the facts in the case. Without this necessary showing of how the defendant was prejudiced by this omission of defense counsel, the defendant still had not presented the district court with a cognizable claim of ineffective assistance of counsel. As such, the district court properly denied the defendant's motion for a rehearing and leave to file an amended petition.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JASPER EDDIE FALKNER, APPELLANT.

398 N.W.2d 708

Filed January 2, 1987. No. 86-501.

1. **Postconviction: Appeal and Error.** The Postconviction Act cannot be used as a substitute for appeal or as a further review of issues already litigated.
2. _____: _____. A motion for postconviction relief may not raise questions which were or could have been raised on direct appeal.
3. **Constitutional Law: Trial: Juries.** Lack of jury members of the same race as the defendant, standing alone, does not support a claim of improper racial composition of the jury.
4. _____: _____: _____. All that the Constitution forbids is systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels. The burden is on the defendant to allege and prove such systematic exclusion.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Jasper Eddie Falkner, pro se.

Robert M. Spire, Attorney General, and Fredrick F. Neid, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Defendant appeals from the judgment of the district court denying his motion for postconviction relief and an evidentiary hearing thereon.

In his pro se brief defendant assigns two errors: (1) "The all white jury veniremen wherefrom relator's jury was chosen which did not have any blacks on it from which all blacks had been deliberately, systematically and unconstitutionally excluded"; and (2) "The total ineffectiveness of relator's counsel for his refusal and failure to challenge the array . . . ." Additionally, by virtue of an "amended brief," defendant appears to further assign as error the claim of ineffectiveness of trial counsel in the cross-examination of the State's witnesses. We affirm.

Ineffectiveness of counsel was considered by this court in defendant's direct appeal, in which he appeared pro se and was also represented by counsel. *State v. Falkner*, 218 Neb. 896, 360 N.W.2d 482 (1984). This court has consistently held that the Postconviction Act cannot be used as a substitute for appeal or as a further review of issues already litigated. *State v. Lytle, ante* p. 486, 398 N.W.2d 705 (1987); *State v. Hurlburt*, 221 Neb. 364, 377 N.W.2d 108 (1985).

In raising the question of ineffectiveness of counsel on direct appeal, as he did, defendant could have litigated the questions of alleged failure of counsel to challenge the racial composition of the trial jury and the claimed ineffective cross-examination of the State's witnesses. A motion for postconviction relief may not raise questions which were or could have been raised on direct appeal. *State v. Galvan*, 222 Neb. 104, 382 N.W.2d 337 (1986). The second and third assignments of error are without merit.

In his application for postconviction relief defendant alleges only that there are black people living in Sarpy County but that none were called to serve on his jury. Lack of jury members of

the same race as the defendant, standing alone, does not support a claim of improper racial composition of the jury. *Bell v. State*, 159 Neb. 474, 67 N.W.2d 762 (1954) (no constitutional or statutory requirements that a jury shall be composed of both whites and blacks in certain proportions).

> All that the Constitution forbids, however, is systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels; a defendant may not, for example, challenge the makeup of a jury merely because no members of his race are on the jury, but must prove that his race has been systematically excluded.

Apodaca v. Oregon, 406 U.S. 404, 413, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972).

It goes without saying that not only must the defendant prove improper racial exclusion by surveys or statistical data, or other analysis reflecting systematic exclusion, but must, in the first instance, allege such facts. That he has not done.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHNNY DON CLANCY, APPELLANT.

398 N.W.2d 710

Filed January 2, 1987. No. 86-531.

1. **Theft: Value of Goods: Proof.** Where value of goods is an element of the crime charged and there is a market for the goods, the value to be proved is the market value at the time and place of the alleged crime.
2. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury—all of which is within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
3. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence

having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1985)).

4. **Rules of Evidence: Other Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Neb. Evid. R. 404(2) (Neb. Rev. Stat. § 27-404(2) (Reissue 1985)).
5. _____: _____. Neb. Evid. R. 404(2) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character. Thus, Rule 404(2) permits evidence of other acts if such acts are relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged. Neb. Rev. Stat. § 27-404(2) (Reissue 1985).
6. _____: _____. The "purposes" set forth in Neb. Evid. R. 404(2) (Neb. Rev. Stat. § 27-404(2) (Reissue 1985)) are not exhaustive or mutually exclusive but are illustrative only, and are not pigeonholes for admission of evidence pertaining to "other acts."
7. **Evidence: Trial: Appeal and Error.** The admission or exclusion of evidence is a matter within the sound discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion.
8. **Rules of Evidence: Other Acts: Witnesses.** Under Neb. Evid. R. 404(2), a defendant's attempted intimidation or intimidation of a State's informant or witness is relevant evidence concerning the defendant's conscious guilt that a crime has been committed. Neb. Rev. Stat. § 27-404(2) (Reissue 1985).
9. **Motions for Mistrial: Appeal and Error.** Determination whether to grant a mistrial is a matter within the sound discretion of a trial court, whose ruling regarding a mistrial will be upheld unless such ruling constitutes an abuse of discretion.
10. **Directed Verdict.** In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
11. **Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt.

Appeal from the District Court for Adams County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Janie C. Castaneda, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Johnny Don Clancy appeals his conviction in a jury trial and sentence to imprisonment for a term of 20 months to 5 years for violating the Nebraska Criminal Code, Neb. Rev. Stat. § 28-517 (Reissue 1985), which provides: "A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner."

In accordance with the language found in § 28-517, the information charged that Clancy received, retained, or disposed of stolen property belonging to Todd Burgess and having a value more than $300, a crime which is a Class IV felony. See Neb. Rev. Stat. § 28-518(2) (Reissue 1985). Burgess' property was a 65-horsepower Mercury outboard motor.

Clancy claims the following errors occurred at his trial: (1) Insufficient evidence on the value of the outboard motor in question; (2) Improper admission of evidence (testimony of Jane DeVaney concerning Clancy's telephone call to her); (3) Failure to grant a mistrial; and (4) Failure to grant a directed verdict at the close of all evidence. Clancy also contends that the sentence imposed is excessive.

To prove the value of Burgess' outboard motor, the State called Leonard Heil as a witness. Heil owned Heil Marine Center, a business involving sales, purchases, and appraisals of new and used outboard motors, including Mercury outboards. After he had inspected Burgess' motor before trial, Heil testified that he would buy that outboard for $250 in the hope that the motor might be sold in the course of Heil's business, giving Heil a profit on resale. Heil then testified that the Burgess outboard, "as is," had a "fair market value" of, or was worth, $400 "on the open market." Clancy argues, "The evidence clearly established that the price which would be paid for the motor by a willing, knowledgable buyer was only

$250.00 and not over $300.00 as charged in the information." Brief for Appellant at 6.

State v. Hayes, 187 Neb. 325, 190 N.W.2d 621 (1971), involved prosecution for receiving or buying stolen goods which had a value greater than $100 (grand larceny), in violation of Neb. Rev. Stat. § 28-513 (Reissue 1964). In *Hayes* this court stated at 326, 190 N.W.2d at 622:

> The value of the goods in question is an essential element of the crime and like all other elements thereof the evidence must be sufficient to support a finding of the necessary value beyond a reasonable doubt.
>
> This and other courts have long held that where value of goods is an element of the crime charged and there is a market for the goods, the value to be proved is the market value at the time and place. [Citations omitted.]

See, also, *State v. Redding*, 213 Neb. 887, 331 N.W.2d 811 (1983); *State v. Weik*, 206 Neb. 217, 292 N.W.2d 289 (1980).

Although Heil initially indicated that, in conjunction with his business activity, he would pay $250 for the Burgess outboard, he also testified about the Burgess outboard in terms of "fair market value" and its value "on the open market," thereby distinguishing "market value" from the price he might pay as a motor merchant anticipating a profitable resale of the motor.

> In determining whether evidence is sufficient to sustain a conviction in a jury trial, [the Supreme Court] does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury—all of which is within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.

State v. Schott, 222 Neb. 456, 462, 384 N.W.2d 620, 624-25 (1986).

Heil's testimony supplied the jury with relevant evidence from which a jury could reasonably find that the value of Burgess' outboard motor was "three hundred dollars or more." See § 28-518(2).

Next, Clancy complains that his telephone call to Jane

DeVaney was erroneously admitted as evidence. According to her testimony, for 3 years Jane DeVaney had been acquainted with Clancy, who dated DeVaney's daughter. About 11 p.m. on an unspecified date early in December 1985, Clancy brought a Mercury outboard motor to DeVaneys' home and asked to leave the motor in the DeVaney garage. Sometime later, Jane DeVaney became suspicious about the motor and "thought it might have been stolen." On February 4, 1986, she telephoned the Adams County Sheriff's Department concerning the outboard motor. In response to Mrs. DeVaney's call, Deputy Larry Peterson came to the DeVaney home on February 4 to investigate, and later transported the outboard to the basement of the Adams County Courthouse, where Burgess identified the motor as his missing and stolen property. At the sheriff's office on the evening of February 5, Deputy Peterson interrogated Clancy concerning the Mercury motor. After his arrest Clancy posted bond, was released from custody, and, in a telephone call to Jane DeVaney, said "he was going to come over and kill Gary and I, or else have our house blown up." Gary is Jane DeVaney's husband. On the basis of relevancy Clancy objected to Jane DeVaney's testimony about the telephone call, and when that objection was overruled, Clancy requested a mistrial, which the court denied. In his testimony Clancy never denied the telephone call to Jane DeVaney or the contents of that call as testified by her. In pertinent part Neb. Rev. Stat. § 28-919 (Reissue 1985) states:

> (1) A person commits an offense if, believing that an official proceeding or investigation of a criminal matter is pending or about to be instituted, he attempts to induce or otherwise cause a witness, informant, or juror to:
>
> . . . .
>
> (b) Withhold any testimony, information, document, or thing; . . .
>
> . . . .
>
> (2) Tampering with witnesses, informants, and jurors is a Class IV felony.

Clancy contends: "Since Appellee did not establish that [the telephone call to Jane DeVaney] shows guilty knowledge or any of the other permitted purposes the evidence only went to prove

the bad character of the Appellant and as such under the provisions of Neb. Rev. Stat. §27-404(2) is not admissible." Brief for Appellant at 8.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1985)). See, also, *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985).

Neb. Evid. R. 404(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Neb. Rev. Stat. § 27-404(2) (Reissue 1985).

> Rule 404(2) of the Nebraska Evidence Rules is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character. Thus, Rule 404(2) permits evidence of other acts if such acts are relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged.

State v. Stewart, 219 Neb. 347, 351, 363 N.W.2d 368, 371 (1985). See, also, *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

The "purposes" set forth in Neb. Evid. R. 404(2) are not exhaustive or mutually exclusive but are illustrative only, and are not pigeonholes for admission of evidence pertaining to "other acts." See, *State v. Craig, supra; State v. Stewart, supra.*

> However, Rule 404(2) is subject to the overriding protection of Rule 403 of the Nebraska Evidence Rules [Neb. Rev. Stat. § 27-403 (Reissue 1985)] (exclusion, if probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, misleading the jury, causing undue delay, wasting time, or needlessly presenting cumulative evidence).

State v. Craig, supra at 77, 361 N.W.2d at 213 (1985).

The admission or exclusion of evidence is a matter within the sound discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion. *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986).

In Clancy's case the burden was on the State to prove, beyond a reasonable doubt, that Clancy, knowing or believing that the Mercury outboard motor had been stolen, received or retained the outboard motor without his intention to restore the motor to its owner. See § 28-517.

The mental element involved in the offense charged against Clancy, "knowing" or "believing" that the outboard had been stolen, is crucial for commission of the crime charged. In the context found, Clancy's telephone call to Jane DeVaney was an attempt to influence or discourage any further informational activity by DeVaney relative to the pending charge against Clancy or his eventual trial for the crime charged. Would evidence of the telephone call to Jane DeVaney entitle a reasonable juror to believe that it was more probable that Clancy was conscious or knew that the outboard motor had been stolen? See Neb. Evid. R. 401 (relevant evidence; defined). See, also, McCormick on Evidence § 185 (E. Cleary 3d ed. 1984). If the answer to that question is in the affirmative, the telephone call has probative value and is admissible as relevant evidence.

Probative value is a relative concept and involves a measurement of the degree to which the evidence persuades the trier of fact that a particular fact exists and the distance of that particular fact from the ultimate issue in the case. See *State v. Bostwick, supra*.

Before enactment of the Nebraska Evidence Rules in 1975, this court ruled that a defendant's act occurring after commission of a crime was a relevant circumstance from which an inference of the defendant's guilt may be drawn. For instance, in *Kennedy v. State*, 71 Neb. 765, 99 N.W. 645 (1904), evidence of an attempted escape from jail by a defendant, awaiting trial, was admissible on the " 'question of the guilt or innocence of the accused.' " 71 Neb. at 770, 99 N.W. at 646. In

Crowell v. State, 79 Neb. 784, 113 N.W. 262 (1907), this court held that the defendant's attempt to induce a witness to leave the state and refrain from testifying at the defendant's trial was admissible in " 'determining the guilt or innocence of the defendant.' " 79 Neb. at 785, 113 N.W. at 262. *State v. Nelson*, 182 Neb. 31, 152 N.W.2d 10 (1967), involved a situation where, pending trial, the defendant "drove [the witness] out into the country where defendant said: '* * * he was going to whip' " the witness and then assaulted the witness. 182 Neb. at 37, 152 N.W.2d at 14. In *Nelson* this court stated: "Evidence of threats made to, or of an assault made upon, a witness by a defendant is admissible." 182 Neb. at 39, 152 N.W.2d at 15.

Therefore, in view of the Nebraska Evidence Rules, this case presents a question of first impression: Is a defendant's attempted intimidation or intimidation of a State's informant or witness admissible under Neb. Evid. R. 404(2)?

Referring to conduct as evidence of guilt, Wigmore has expressed: "No one doubts that the state of mind which we call 'guilty consciousness' is perhaps the strongest evidence . . . that the person is indeed the guilty doer; nothing but an hallucination or a most extraordinary mistake will otherwise explain its presence." 2 J. Wigmore, Evidence in Trials at Common Law § 273(1) at 115 (J. Chadbourn rev. 1979). "There are two processes or inferences involved—from conduct to consciousness of guilt, and then from consciousness of guilt to the guilty deed." 1A J. Wigmore, *supra* § 173 at 1840.

The Supreme Court of Illinois, in *The People v. Gambony*, 402 Ill. 74, 80, 83 N.E.2d 321, 325 (1948), stated:

> Any attempt by a party to a suit, either civil or criminal, to conceal or, by threats or otherwise, to suppress evidence or obstruct an investigation of an issue, is relevant upon the trial of such issue. In a criminal prosecution any attempted intimidation of a witness is properly attributable to a consciousness of guilt, and testimony relating thereto is relevant and admissible in evidence.

A defendant's attempted intimidation or intimidation of a State's witness is evidence of the defendant's "conscious guilt" that a crime has been committed and serves as a basis for an inference that the defendant is guilty of the crime charged. See

People v. Smith, 3 Ill. App. 3d 958, 279 N.E.2d 512 (1972). See, also, *State v. Shaw*, 199 Mont. 248, 253, 648 P.2d 287, 290 (1982) (under Rule 404(b), Mont. R. Evid., the defendant's attempted intimidation of a witness was relevant to the crime charged, "indicating consciousness of guilt"). As further illustration that "there is no new thing under the sun," more than two millennia ago it was observed: "There is no witness so dreadful, no accuser so terrible as the conscience that dwells in the heart of every man." (Polybius.) Consequently, we now hold that, under Neb. Evid. R. 404(2), a defendant's attempted intimidation or intimidation of a State's informant or witness is relevant evidence concerning the defendant's conscious guilt that a crime has been committed, and is a circumstance from which an inference may be drawn that the defendant is guilty of the crime charged.

We conclude that Clancy's threatening telephone call to Jane DeVaney was important evidence to the State's case. The probative value of the telephone call, as proof of Clancy's conscious guilt for the crime charged, outweighed prejudice to Clancy and did not confuse the issues being tried or mislead the jury. See Neb. Evid. R. 403 (Neb. Rev. Stat. § 27-403 (Reissue 1985)) (exclusion of relevant evidence). Therefore, Jane DeVaney's testimony about the telephone call was admissible evidence.

Next, Clancy claims that a mistrial should have been granted in view of Jane DeVaney's testimony concerning the telephone call from Clancy.

> A mistrial results in nullification of a pending jury trial. In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process. Some examples are an egregiously prejudicial statement by counsel, the improper admission of prejudicial evidence, or the introduction of incompetent matters to the jury, to the extent that any damaging effect cannot be removed by proper admonition or instruction to the jury. [Citations omitted.]
>
> Courts have considerable discretion in passing on the

motions for mistrial, to the end that justice be more nearly effectuated.

State v. Archbold, 217 Neb. 345, 351, 350 N.W.2d 500, 504 (1984). Determination whether to grant a mistrial is a matter within the sound discretion of a trial court, whose ruling regarding a mistrial will be upheld unless such ruling constitutes an abuse of discretion. See *State v. Archbold, supra*. See, also, *State v. Borchardt, ante* p. 47, 395 N.W.2d 551 (1986). Because the evidence of the telephone call to DeVaney was admissible, as we have previously determined, there was no basis for the mistrial sought by Clancy, and the district court correctly denied Clancy's request for a mistrial.

Clancy's penultimate assignment of error is the denial of a directed verdict at the close of all the evidence. In a criminal case a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. See, *State v. Smith*, 219 Neb. 176, 361 N.W.2d 532 (1985); *State v. Rubek*, 220 Neb. 537, 371 N.W.2d 115 (1985).

Clancy readily admitted that he brought the outboard motor to the DeVaney garage, where the motor remained in storage until removed by Deputy Larry Peterson. Thus, a critical point in this case is Clancy's explanation for his possession of the outboard motor. According to Clancy, after awaiting termination of a 2-hour conversation between Raymond Rothfuss and an unidentified "older fellow" at the Rothfuss residence in late November 1985, Clancy struck an agreement with Rothfuss for purchase of the outboard at a price of $500, with a deferred payment. Clancy never made a payment for the outboard. To counter Clancy's explanation that the motor had been purchased from Rothfuss, the State called Todd Burgess, who, after identifying the motor in question as the one severed with a hacksaw from his boat, established that his outboard motor was stolen. Melvin Schafer, a long-time fishing companion of Rothfuss, testified that he was acquainted with all Rothfuss' boating and fishing equipment; weekly checked everything at Rothfuss', including "coolers full of night

crawlers," during the last stages of Rothfuss' illness with cancer; and had seen Rothfuss' Ebko boat with two outboard motors, a 115-horsepower Evinrude and a 15-horsepower Scott motor, but no Mercury motor at the Rothfuss place. Carol Ann Spear, Rothfuss' daughter, testified that she frequently, at least weekly, visited her father, whose only occasion to be outside his home was when he went "to the hospital for cobalt treatments." Rothfuss died December 11, 1985. When Deputy Peterson began to question Clancy about the Mercury outboard motor, Clancy remarked: "Gee, I hope it isn't stolen." On cross-examination, in reference to his conversation with Deputy Peterson, Clancy was asked whether he was concerned that the motor was stolen, and Clancy answered: "Sure I was." Last, but not least, there was Clancy's threatening telephone call to Jane DeVaney, as previously mentioned.

"Circumstantial evidence is sufficient if the evidence and reasonable inferences that may be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt." *State v. Ellis*, 223 Neb. 779, 782, 393 N.W.2d 719, 722 (1986). " 'One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt.' " *State v. Schott*, 222 Neb. 456, 462, 384 N.W.2d 620, 625 (1986). We conclude that, regarding every element of the offense charged, there was evidence with probative value to submit to the jury the question whether Clancy was guilty of the crime charged. The district court correctly denied Clancy's motion for a directed verdict.

Finally, Clancy claims the sentence imposed is excessive. Clancy is convicted of a Class IV felony, punishable by imprisonment for 5 years, a $10,000 fine, or both such imprisonment and fine, with no minimum penalty prescribed. See Neb. Rev. Stat. § 28-105 (Reissue 1985).

> We have regularly and repeatedly held that a sentence imposed within the statutory limits will not be modified on appeal, absent an abuse of discretion on the part of the trial court. [Citations omitted.] Furthermore, we have repeatedly held that the granting of probation as opposed

> to imposing of a sentence is a matter which is left to the sound discretion of the trial court, and absent a showing of abuse, this court will not on appeal disturb the trial court's denial of probation.

State v. Bovill, 223 Neb. 764, 767, 393 N.W.2d 715, 717 (1986).

The presentence investigation and report discloses a long list of Clancy's prior criminal offenses, which includes the following convictions and sentences: 1979—three counts of misdemeanor theft (60 days in county jail) and a felony burglary (2 years' probation and 90 days in county jail); 1981—theft (90 days in county jail); 1984—assault (120 days in county jail), false reporting (60 days in county jail), and third degree assault (30 days in county jail); 1985—third degree assault (1 year in Nebraska Penal and Correctional Complex; released August 28, 1985). Based upon the nature of the charge in the present case and Clancy's history of criminal acts, including impermissible liberties with people and the property of others, we find that the district court did not abuse its discretion in the sentence imposed on Clancy.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES L. DILLON, APPELLANT.
398 N.W.2d 718

Filed January 2, 1987. No. 86-545.

1. **Plea Bargains.** The State may withdraw from a plea arrangement at any time prior to, but not after, actual entry of the defendant's guilty plea or before the defendant's other action constituting detrimental reliance on the plea arrangement.
2. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and which were capable of being raised, but were not raised, in the defendant's direct appeal.
3. _____: _____. In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.

Appeal from the District Court for Nuckolls County: ORVILLE L. COADY, Judge. Affirmed.

Richard Scott, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

After an examination of the verified motion of Charles L. Dillon, as well as an examination of the files and records in Dillon's case, the district court declined to grant an evidential hearing on the motion and denied postconviction relief to Dillon. See Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985) (postconviction proceedings). We affirm.

Dillon claims he has been denied due process of law, guaranteed by Neb. Const. art. I, § 3, and U.S. Const. amend. XIV, concerning his nolo contendere plea entered to the charge of first degree sexual assault. Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1985). As the result of his nolo contendere plea, Dillon was convicted and sentenced to not less than 16 nor more than 49 years in the Nebraska Penal and Correctional Complex.

The factual background for Dillon's conviction is found in our opinion disposing of Dillon's direct appeal, *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986).

Initially, Dillon was charged with four felonies which occurred on November 1, 1984, namely, attempted first degree murder, first degree arson, burglary, and first degree sexual assault (forcible). Dillon was arraigned in the district court on February 11, 1985, and entered a not guilty plea to all four felonies charged. Sometime between arraignment and "two or three days" before Dillon's next court appearance on March 7, there were plea negotiations involving Dillon personally, his attorney, and the county attorney, during which, according to Dillon, "[W]e worked out our agreement, you know, a verbal agreement," whereby Dillon would plead to "breaking and

entering and theft," but "They brought this affidavit in, bingo [the county attorney] says . . . we will take the sex offense charge and that is because we've got this [affidavit]." The affidavit mentioned by Dillon was the "affidavit from a Kansas woman who stated that, in August 1983, she was forcibly sexually assaulted by Dillon." 222 Neb. at 133, 382 N.W.2d at 355.

On March 7 Dillon, with his lawyer, appeared before the district judge, who was informed that there had been plea negotiations and remarked: "I assume there has been some agreement between the State and the defendant." The county attorney stated the plea arrangement for disposition of the charges against Dillon, namely: In exchange for Dillon's plea of nolo contendere to the charge of forcible sexual assault, the State agreed to dismiss the other pending felony charges (attempted murder, arson, and burglary). The county attorney did not state or indicate any position or views regarding a possible sentence on Dillon's conviction. After acknowledging the plea arrangement which the county attorney had described to the court, Dillon entered his nolo contendere plea to first degree sexual assault. In accordance with *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), the court then determined that Dillon's nolo contendere plea was intelligently, voluntarily, and understandingly made; concluded that Dillon had validly waived the rights specified in *Irish*; found a factual basis for Dillon's plea; and accepted Dillon's plea of nolo contendere to first degree sexual assault.

Dillon's due process claim is founded on the initial plea bargain to dispose of Dillon's case on the basis of "breaking and entering and theft" charges and the county attorney's later withdrawal of that agreement before Dillon's plea.

In the main, Dillon relies on *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), which involved a guilty plea entered on a prosecutor's promise to refrain from recommending a sentence to be imposed on Santobello. At the hearing for sentencing, the prosecutor recommended that Santobello receive the maximum sentence. The sentencing court, disclaiming any influence by the prosecutor's recommendation, imposed the maximum penalty under New

York law. The U.S. Supreme Court, considering "fairness in securing agreement between an accused and a prosecutor," 404 U.S. at 261, and "the interests of justice," 404 U.S. at 262, stated:

> [The plea arrangement] phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

404 U.S. at 262.

Although Dillon may envision some principle of contract law entitling him to specific enforcement of a plea arrangement, we find the words of the U.S. Supreme Court appropriate: "[W]e do not deal here with notions of offer, acceptance, consideration, or other concepts of the law of contracts. We deal with constitutional law." *Brewer v. Williams*, 430 U.S. 387, 401 n.8, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).

In *State ex rel. Fortner v. Urbom*, 211 Neb. 309, 318 N.W.2d 286 (1982), this court adopted the following principle: The State may withdraw from a plea arrangement at any time prior to, but not after, actual entry of the defendant's guilty plea or before the defendant's other action constituting detrimental reliance on the plea arrangement. See *Shields v. State*, 374 A.2d 816 (Del. 1977).

Dillon has failed to demonstrate a lack of fundamental fairness, that is, a denial of due process, regarding the plea arrangement and his nolo contendere plea. First, Dillon has not shown in what manner the State has failed to fulfill its part of the plea arrangement reached with Dillon. Second, the record conclusively establishes, and Dillon does not deny, that the initial plea arrangement was withdrawn before Dillon entered his nolo contendere plea. Third, Dillon does not show that he, relying on the initial plea arrangement, took any action or refrained from acting in reference to his eventual nolo contendere plea. Dillon's statements about plea negotiations

clearly establish that the change in the State's position occurred before Dillon had taken any action at all. Dillon's eventual action, including his nolo contendere plea, was taken after notice that any prospective nolo contendere plea, as ultimately entered on March 7, related to the charge of first degree sexual assault. Moreover, Dillon's nolo contendere plea was the result of the second and distinctly new plea arrangement extended by the State and was not a product of the first plea arrangement withdrawn by the State. As determined by the district court, Dillon intelligently, voluntarily, and understandingly entered his nolo contendere plea to the charge of first degree sexual assault. Accordingly, Dillon was not coerced in his acceptance of the State's altered and revised plea arrangement. We conclude that Dillon has not been denied due process of law concerning his nolo contendere plea entered pursuant to the plea arrangement in this case.

A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and which were capable of being raised, but were not raised, in the defendant's direct appeal. *State v. Hurlburt*, 221 Neb. 364, 377 N.W.2d 108 (1985). In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous. *State v. Williams, ante* p. 114, 396 N.W.2d 114 (1986). The decision and judgment of the district court are correct.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JUNEAL DALE PRATT, APPELLANT.
398 N.W.2d 721

Filed January 2, 1987. No. 86-608.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Juneal Dale Pratt, pro se.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an appeal from the district court for Douglas County, Nebraska, wherein Juneal Dale Pratt sought postconviction relief pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). While the assignments of error are couched in terms which purport to raise constitutional issues, in fact Pratt's sole and only complaint is that the sentences imposed were excessive. The district court denied Pratt's request for relief without an evidentiary hearing. We agree with the decision of the district court.

These cases, including the sentences, were appealed and affirmed by this court in *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1977), and *State v. Pratt*, 197 Neb. 390, 249 N.W.2d 500 (1977). They are not, therefore, proper subjects for postconviction relief. See *State v. Hurlburt*, 221 Neb. 364, 377 N.W.2d 108 (1985). A motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. See, *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984), *cert. denied* 469 U.S. 873, 105 S. Ct. 226, 83 L. Ed. 2d 156; *State v. Weiland*, 188 Neb. 626, 198 N.W.2d 327 (1972). The decision of the district court denying postconviction relief is affirmed.

AFFIRMED.

ROLAND E. REYNOLDS ET AL., APPELLANTS, V. HAROLD S. MYERS ET AL., APPELLEES.

398 N.W.2d 722

Filed January 16, 1987. No. 85-385.

Appeal and Error. Where the appellants' brief does not contain specific assignments of error as required by Neb. Rev. Stat. § 25-1919 (Reissue 1985) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1986), the judgment will be affirmed in the absence of any plain error this court may note.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Mary Cannon Veed and Michele M. Wheeler, for appellants.

Gerald P. Laughlin of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, and Frank A. Taylor of Kutak, Rock & Campbell, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The appellants' brief in this case, which was filed on September 30, 1985, contained no specific assignments of error as required by Neb. Rev. Stat. § 25-1919 (Reissue 1985) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). In this circumstance the judgment will be affirmed in the absence of any plain error this court may note. *In re Interest of P.W., ante* p. 197, 397 N.W.2d 36 (1986).

We note no plain error. The judgment is, therefore, affirmed.

AFFIRMED.

CAPORALE, J., not participating.

HENRY BUSEKIST, APPELLANT AND CROSS-APPELLEE, V. ANN I. BUSEKIST, APPELLEE AND CROSS-APPELLANT.

398 N.W.2d 722

Filed January 16, 1987. No. 85-487.

1. **Antenuptial Agreements: Intent: Divorce.** An unambiguous antenuptial agreement which neither expressly nor by reasonable implication indicates an intention of the parties that it be valid upon divorce shall not be valid and binding upon the dissolution of marriage.
2. **Property Division: Alimony: Appeal and Error.** It is the rule in Nebraska that the division of property and the awarding of alimony in marriage dissolution cases are matters entrusted to the sound discretion of the trial judge. On appeal these matters will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed in part, and in part reversed.

James T. Gleason of Swarr, May, Smith & Andersen, P.C., for appellant.

Bernard T. Schafersman of Yost, Schafersman, Yost, Lamme & Hillis, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

Henry Busekist appeals the decree of the district court for Douglas County dissolving his marriage with Ann I. Busekist. In his appeal Henry alleges the district court erred in finding the antenuptial agreement between the parties was a binding agreement which survived the dissolution of the marriage. Henry further alleges the court erred in finding reasonable the amount of alimony awarded and in granting Ann a $10,000 mortgage on the home of Henry as a reasonable division of property. Ann cross-appeals, alleging the district court erred in not awarding her one-half the jointly owned house and in not awarding alimony payments for at least 48 months. Ann further assigns as error the district court's failure to secure the payments provided for in the antenuptial agreement and its refusal to award attorney fees and court costs. For the reasons hereinafter stated the judgment of the district court is reversed

in part and affirmed in part.

The facts preceding this matter are relatively simple. Henry Busekist and Ann Marshall were married on August 17, 1981. Henry, at the time of trial, was 80 years old and Ann was 55. Henry was retired and was a widower at the time of the marriage. Henry has heart problems, is hard of hearing, and must use a cane to walk. Ann is in good physical condition except for a painful arthritis condition requiring medication. No children were born of this union, and neither party is responsible for the welfare and support of any minor children. Henry has one adult daughter from a prior marriage.

At the time of the marriage the parties were possessed of substantially different assets. Henry's assets consisted of 400 acres of farmland, a home, savings, certificates of deposit, a car, coin collection, and antiques and other household furnishings. Ann's assets included her car, some household goods, and rights in a teachers' retirement plan.

Due to the substantial difference in assets, the parties executed an antenuptial agreement. The agreement was to define and limit the claims and demands which each of the parties might have against the estate of the other. The agreement provided that Henry would transfer the title of his principal residence to Henry and Ann as joint tenants with rights of survivorship. Furthermore, the agreement provided that in the event Henry shall predecease Ann, his estate would pay $600 per month to Ann during her lifetime. This payment was to come from the income of a trust created at the time the agreement was entered into, having as its corpus the 400 acres of farmland.

The marriage lasted for approximately 3 years before Henry filed a petition for dissolution. During this brief period of marital union, the couple experienced a shortage of income. Henry complained about excessive spending, but the financial problems continued. The marriage was dissolved by a decree of the district court for Douglas County. The decree held the antenuptial agreement to be valid and binding. Furthermore, the court granted the respondent, Ann, a mortgage to the value of $27,500 on the family residence as a result of the joint tenancy deed. This was later amended to a $10,000 mortgage.

Finally, the decree ordered alimony payments of $500 per month for 24 months to be paid to the respondent.

Petitioner's first assignment of error concerns the district court's finding that the antenuptial agreement was valid and binding. The general rule in Nebraska regarding the validity of antenuptial agreements in the event of divorce, as stated in *Sims v. Sims*, 186 Neb. 780, 186 N.W.2d 491 (1971), is that an antenuptial agreement containing no provision to the contrary is not affected by a divorce of the parties. We hold that the rule as stated in *Sims* is too broad in that it may operate to hold valid, in the event of divorce, an antenuptial agreement that is clearly to become effective only in the event of the death of a spouse simply because there is not an express provision to the contrary in the agreement. The agreement entered into between the parties in this case, when read as a whole, is clearly to be effective only as long as the marital relationship exists. The agreement neither expressly nor by reasonable implication indicates the parties wished the agreement to be effective in the event of divorce. The situation presented in *Sims* differs significantly on one important fact. In *Sims*, while there was no express provision in the agreement that the agreement should remain effective after a divorce, there was evidence adduced at trial that such was the intention of the parties. In the *Sims* case the parties had removed from the agreement, as signed, a provision that expressly voided the antenuptial agreement in the event of divorce. Such conduct was relevant evidence leading to the conclusion that the parties intended their agreement to continue in effect even after divorce.

In the present case there was testimony to the effect that the topic of divorce was never discussed as the antenuptial agreement was prepared. Such a document contemplating only the death of a spouse cannot be reasonably expected to include a provision for continued support after the marriage is dissolved by a divorce. Furthermore, in the absence of such a provision, such an agreement cannot be held to be valid and binding in the event of a divorce. Therefore, we hold that as to petitioner's first assignment of error, the district court did commit error in finding the antenuptial agreement a valid and binding agreement in light of the divorce. We hold that an

unambiguous antenuptial agreement which neither expressly nor by reasonable implication indicates an intention of the parties that it be valid upon divorce shall not be valid and binding upon the dissolution of marriage. To the extent it holds otherwise, *Sims* is overruled.

This is not to say that an antenuptial agreement may not specifically contain certain agreements between the parties to become effective in the event of a divorce between those parties. If the parties desire, they may so contract. Such a contract, however, is subject to our holding in *Mulford v. Mulford*, 211 Neb. 747, 749, 320 N.W.2d 470, 471 (1982), which states:

> It is generally held that antenuptial agreements providing in the event of divorce or separation the spouse should forfeit his or her rights in the property of the other are contrary to public policy and void as tending to promote divorce. This court so indicated in the early cases of *Tiernan v. Tiernan,* 112 Neb. 707, 201 N.W. 145 (1924), and *White v. White,* 112 Neb. 850, 201 N.W. 662 (1924).

In any event, in a divorce action the effect of an appropriate antenuptial agreement has been set out in *White v. White,* 112 Neb. 850, 853, 201 N.W. 662, 664 (1924), where we stated:

> The statute has made no exceptions in the case of an antenuptial contract, and the power is vested in the trial court to make fair and fitting award not limited by the provisions of such contract. The contract may be in evidence, among other evidence, as to the amount to be awarded, but no more.

Petitioner's last two assignments of error shall be considered together with respondent's first two assignments of error in her cross-appeal. These are concerned with the property division and the award of alimony. It is the rule in Nebraska that the division of property and the awarding of alimony in marriage dissolution cases are matters entrusted to the sound discretion of the trial judge. On appeal these matters will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986); *Anderson v. Anderson*, 222 Neb. 212, 382 N.W.2d 620 (1986). The ultimate test in determining correctness in the amount of alimony awarded as well as the

appropriateness of the division of property is reasonableness as determined by the facts of each case. *Taylor v. Taylor, supra; Burhoop v. Burhoop*, 221 Neb. 657, 380 N.W.2d 254 (1986). An appropriate division of property must turn on reasonableness and the circumstances of each case in light of the factors set forth in Neb. Rev. Stat. § 42-365 (Reissue 1984). *Sullivan v. Sullivan*, 223 Neb. 273, 388 N.W.2d 516 (1986). These factors include duration of the marriage, history of the contributions to the marriage by each party, interruption of personal careers or educational opportunities, and the ability to engage in gainful employment. § 42-365. After a careful review of the record, we find no abuse of discretion on behalf of the trial court. The division of property, including the awarding to respondent, Ann Busekist, a lien in the form of a first mortgage in the amount of $10,000 on the family residence, as well as the award of alimony for 24 months was reasonable in light of the circumstances of this particular case.

Respondent's third assignment of error need not be considered. This assignment of error is concerned with the court's failure to secure the payments in the antenuptial agreement. This court's finding that the agreement is no longer a valid and binding document in light of the dissolution of marriage is dispositive of this issue.

Finally, respondent in her cross-appeal alleges the trial court erred in not awarding to her attorney fees and court costs. The awarding of attorney fees is a matter within the trial court's initial discretion. While it is reviewed de novo on the record, it will not be disturbed on appeal in the absence of abuse of discretion. *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986); *Kocarnik v. Kocarnik*, 209 Neb. 454, 308 N.W.2d 352 (1981). In the present instance the decree of the district court ordered each party to pay his or her own attorney fee and court costs. We cannot say upon a de novo review of the record that the district court abused its discretion in not awarding respondent attorney fees. The judgment of the district court is reversed in part and affirmed in part.

AFFIRMED IN PART, AND IN PART REVERSED.

KRIVOSHA, C.J., concurs in the result.

HELEN JOAN WEHLING, APPELLANT, V. DANIEL E. WEHLING, APPELLEE.

398 N.W.2d 726

Filed January 16, 1987. No. 85-546.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

John W. Ballew, Jr., of Raymond, Olsen, Ediger & Ballew, P.C., for appellant.

Mark S. Trustin of Stehlik, Smith, Trustin & Schweer, and, on brief, Herbert M. Sampson III of Sampson & Forney, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Helen Joan Wehling appeals a judgment of the district court dissolving her marriage to Daniel E. Wehling in which the property was divided, but no alimony was awarded. The failure to order alimony and the award of property made are assigned as errors.

We have reviewed the record de novo, as we are required, to determine whether the district court abused its discretion. See *Vitosh v. Vitosh, ante* p. 196, 397 N.W.2d 35 (1986). Our review leads us to the conclusion that the district court did not abuse its discretion, and therefore its judgment should be affirmed.

The judgment is affirmed.

AFFIRMED.

RUSSELL D. OLSON AND GILBERTA OLSON, APPELLANTS, V. COUNTY OF DAKOTA ET AL., APPELLEES.

398 N.W.2d 727

Filed January 16, 1987. No. 85-621.

1. **Taxation: Valuation: Appeal and Error.** A property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization. An appeal may then be taken to the district court from the order of the county board of equalization fixing the assessed value of the property.
2. **Taxation: Valuation: Collateral Attack.** A collateral attack on valuation of property for tax purposes is permissible only if the assessment is partially or entirely void.
3. **Mandamus.** A writ of mandamus is not an available remedy when there is a plain and adequate remedy at law.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

Norris G. Leamer of Leamer Law Office, for appellants.

Kurt A. Hohenstein, Dakota County Attorney, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

The plaintiffs appeal from the order of the district court sustaining the defendants' demurrers and dismissing the action.

The plaintiffs commenced this action in 1985 to obtain a writ of mandamus, compelling the county and the county assessor to correct the valuation for tax purposes for the years 1978, 1979, and 1980 of a tract of real estate owned by the plaintiffs. The defendants filed demurrers, alleging that the plaintiffs failed to state a cause of action, that the court lacked subject matter jurisdiction, and that there was improper joinder of parties defendant. The plaintiffs filed an amended petition, and the defendants' demurrers were again sustained. The plaintiffs elected to stand on their petition, and the action was dismissed. This appeal followed.

Plaintiffs assign as error the trial court's order sustaining the defendants' demurrers. The plaintiffs contend their amended

petition stated a cause of action pursuant to the following language in Neb. Rev. Stat. § 77-519 (Reissue 1986): "The county assessor of any county . . . with the approval of the county board of any county, may correct the tax list before the tax is paid in case of erroneous assessments." They argue that this statute provides property owners with a statutory right to compel the county assessor to correct erroneous tax valuations.

Plaintiffs argue the tax valuations of their property for the years in question are prima facie erroneous because the valuations are substantially higher than the valuations in 1977 and 1981. Accordingly, plaintiffs requested the trial court to order the assessor to correct the tax lists for 1978, 1979, and 1980 to show the value of their property as $44,275, the value stated in 1981.

The plaintiffs are complaining that the valuations placed on their property for the years in question were excessive. We have consistently held that a property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization. An appeal may then be taken to the district court from the order of the county board of equalization fixing the assessed value of the property. Neb. Rev. Stat. §§ 77-1502 (Reissue 1986) and 77-1510 (Reissue 1981); *Riha Farms, Inc. v. Dvorak*, 212 Neb. 391, 322 N.W.2d 801 (1982); *Scudder v. County of Buffalo*, 170 Neb. 293, 102 N.W.2d 447 (1960); *Power v. Jones*, 126 Neb. 529, 253 N.W. 867 (1934). This remedy is full, adequate, and exclusive. *Riha Farms, Inc., supra*. Such a claim cannot be made, in the first instance, "by direct application to any other body or by a collateral attack in law or equity in the event of failure to bring the matter before the county board of equalization and to appeal therefrom in case of an adverse determination." *Id.* at 393, 322 N.W.2d at 803. A collateral attack is permissible only if the assessment is partially or entirely void.

A writ of mandamus is not an available remedy when there is a plain and adequate remedy at law. Neb. Rev. Stat. § 25-2157 (Reissue 1985); *Little v. Board of County Commissioners*, 179 Neb. 655, 140 N.W.2d 1 (1966).

Plaintiffs had an adequate statutory remedy to correct the alleged overvaluation of their property for the years in

question. *Riha Farms, Inc., supra.* The amended petition indicates this procedure was not followed. Further, plaintiffs did not allege the tax assessments were entirely or partially void. Accordingly, plaintiffs have not alleged facts showing a right to mandamus to compel the assessor to correct the tax lists.

Plaintiffs' reliance on § 77-519 as providing a basis for relief in mandamus is misplaced. The purpose of the statute is to permit the county assessor to correct clerical errors in the tax list, not to correct alleged errors in valuation of property.

The trial court properly sustained the defendants' demurrers. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. OLLIE J. DAVIS, APPELLANT.
398 N.W.2d 729

Filed January 16, 1987. No. 86-269.

1. **Prior Convictions: Right to Counsel: Waiver.** To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction. Other objections to the validity of such prior conviction constitute collateral attacks on that prior conviction and must be raised either by direct appeal from the prior conviction or in separate proceedings commenced expressly for the purpose of setting aside such prior conviction as an invalid judgment.
2. **Pleas: Prior Convictions: Appeal and Error.** Whether a defendant's guilty plea, which results in a conviction later used as the basis for application of an enhanced penalty, has been made understandingly, intelligently, and voluntarily is not an issue in the Supreme Court's review concerning the validity of an enhanced punishment imposed on a defendant.
3. **Prior Convictions: Proof.** Existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the accused's testimony and duly authenticated records maintained by the courts or penal and custodial authorities.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Mary G. Likes, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

A jury convicted Ollie J. Davis on the charge of second degree forgery, see Neb. Rev. Stat. § 28-603(1) (Reissue 1985), an offense which occurred on April 25, 1985, and the district court sentenced Davis as a habitual criminal, see Neb. Rev. Stat. § 29-2221 (Reissue 1985). Davis appeals the sentence. We affirm.

For the enhanced penalty (habitual criminal), the State offered exhibits reflecting Davis' guilty pleas resulting in convictions and sentences for two previous felonies—one in a federal court, the other in a state district court of Nebraska. Neither of Davis' prior convictions has been set aside, and Davis has not been pardoned on either conviction and sentence.

Davis contends that the State's evidence for the enhanced penalty is insufficient, that is, the evidence does not show that Davis was "represented by or waived his right to counsel, nor did [the State's documentary proof] set forth whether the pleas were freely and voluntarily and intelligently made." Brief for Appellant at 5. To support his contention Davis relies on *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), where the U.S. Supreme Court, construing the 6th and 14th amendments to the U.S. Constitution, held that an uncounseled felony conviction could not be used to enhance punishment under a recidivist statute.

As noted, Davis' appeal involves a question concerning the sufficiency of evidence to sustain imposition of enhanced punishment under § 29-2221, a penalty prescribed by Nebraska's "habitual criminal" statute.

To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction. Other objections to the validity of such prior conviction constitute collateral attacks on that prior conviction and must be raised either by direct appeal from the prior conviction or in separate

proceedings commenced expressly for the purpose of setting aside such prior conviction as an invalid judgment. *State v. Hamblin*, 223 Neb. 469, 390 N.W.2d 533 (1986). See, also, *State v. Fraser*, 222 Neb. 862, 387 N.W.2d 695 (1986); *State v. Soe*, 219 Neb. 797, 366 N.W.2d 439 (1985); *State v. Baxter*, 218 Neb. 414, 355 N.W.2d 514 (1984).

Whether Davis' guilty pleas to previous felony charges were understandingly, intelligently, and voluntarily made is irrelevant to the present proceedings because such question about either prior plea and resultant conviction is a subject for direct appeal or separate proceedings expressly for the purpose of setting aside those prior convictions, and is a collateral attack on such prior convictions and, therefore, an improper inquiry in the enhancement proceeding under review. Whether a defendant's guilty plea, which results in a conviction later used as the basis for application of an enhanced penalty, has been made understandingly, intelligently, and voluntarily is not an issue in the Supreme Court's review concerning the validity of an enhanced punishment imposed on a defendant. See *State v. Hamblin, supra*. Consequently, we limit our examination to the remainder of Davis' contention, namely, whether the State's evidence was sufficient to prove Davis' two prior counseled convictions for felonies.

Regarding Davis' conviction in federal court, the prosecution introduced into evidence appropriate copies of records for proceedings in the U.S. district courts. The copy of the "Judgment and Commitment," entered on June 18, 1973, in the U.S. District Court for the Southern District of Iowa, recited that "[Davis] appeared in person and by Richard A. Strickler, counsel. IT IS ADJUDGED that the defendant upon his plea of guilty . . . has been convicted of" interstate transportation of a forged check drawn on an Omaha bank in violation of 18 U.S.C. § 2314 (1982). The court sentenced Davis to imprisonment for 3 years but, suspending execution of that sentence, placed Davis on probation for 3 years. Administration of Davis' probation was transferred to federal jurisdiction in Nebraska. On January 2, 1975, Davis appeared with his lawyer before the U.S. District Court for the District of Nebraska, where Davis admitted violation of the 1973

probation ordered by the federal court in Iowa. The federal court in Nebraska vacated the previous order of probation entered in Iowa and then reinstated the 3-year prison sentence imposed in Iowa in 1973.

As proof of Davis' other felony conviction and sentence, the State introduced an appropriate copy of the "Judgment and Sentence" of the district court for Douglas County, Nebraska, entered on June 4, 1975, which document recited: "Ollie J. Davis is present in court with counsel, W. Campbell . . . [and] is arraigned for sentence upon his plea of guilty to the charge of Unlawful Delivery of Controlled Substance, as heretofore entered herein . . . and . . . the said defendant still adheres to his said plea of guilty and says he desires to stand thereon."

At the enhancement hearing after his conviction on the Nebraska forgery charge, Davis acknowledged that his "attorney over there in Iowa worked out a plea bargain with the U.S. attorney over there" and that Davis then entered his guilty plea to the federal charge in Iowa. Concerning his prior conviction in the district court for Douglas County, namely, his guilty plea to the charge of delivering a controlled substance, Davis acknowledged that he was represented by the "Public Defender's Office" when, in 1975, he "pled guilty to delivery of a controlled substance" and was sentenced.

> It is well established that the existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.

State v. Luna, 211 Neb. 630, 634, 319 N.W.2d 737, 740 (1982).

In view of the entire record before us, including Davis' acknowledgments about his prior convictions, there is no doubt that Davis had a lawyer when he entered his guilty plea to each felony charge on which he was previously convicted. The State presented sufficient evidence establishing Davis' counseled felony convictions used as bases for valid imposition of the enhanced punishment prescribed by § 29-2221. There is no error in the sentence imposed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARCHIE M. BISHOP, APPELLANT.

399 N.W.2d 271

Filed January 16, 1987. No. 86-436.

1. **Implied Consent: Miranda Rights: Blood, Breath, and Urine Tests.** There is no requirement in this jurisdiction that *Miranda* warnings be given prior to a request to submit to a chemical test of blood, breath, or urine.
2. **Implied Consent: Blood, Breath, and Urine Tests: Right to Counsel.** Under the implied consent law, a driver is not entitled to consult with an attorney, nor is a delay in the test required should a driver request to consult with an attorney.
3. **Implied Consent: Constitutional Law: Evidence: Self-Incrimination.** Evidence obtained in the implied consent context is not testimonial or communicative and does not fall within the privilege against self-incrimination.
4. **Arrests: Probable Cause.** Probable cause for a warrantless arrest exists when, at the time of the arrest, the officer had knowledge of the facts and circumstances based on reasonably trustworthy information which was sufficient to warrant a prudent man in believing the defendant had committed or was committing an offense.
5. **Arrests.** A suspect may not defeat a warrantless arrest which has been set in motion in a public place upon probable cause by the expedient of escaping to a private place.
6. **Constitutional Law: Criminal Law: Due Process: Jury Trials.** The U.S. Constitution, through the due process clause of the 14th amendment, requires the states to provide a trial by jury whenever the 6th amendment would so require if the case were in federal court.
7. **Constitutional Law: Jury Trials: Waiver.** A voluntary waiver of the constitutional right to a jury trial must be express and intelligent.
8. **Jury Trials: Waiver.** A demand is required to invoke the statutory right to a jury trial for a petty offense in county court. A failure to file a timely request in accordance with the rules of court constitutes a waiver of the statutory right to a jury trial.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Judgment on count I affirmed as modified. Judgment on count II affirmed. Judgment on count III reversed, and the cause remanded for a new trial.

Clyde F. Starrett, for appellant.

Robert M. Spire, Attorney General, and Janie C. Castaneda, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

The defendant was found guilty of driving while under the influence (count I), refusing a chemical test (count II), and resisting arrest (count III). On count I he was fined $250 and sentenced to 7 days in jail, and his operator's license was revoked for 6 months; on count II he was fined $200 and sentenced to 7 days in jail, the sentences to run concurrently; and on count III he was fined $250. He was found not guilty of leaving the scene of a property damage accident (count IV).

The district court affirmed the convictions and sentences. This appeal followed.

The incident which led to the convictions occurred on December 22, 1984. On that evening, at approximately 8:50, Officer Barbara McMullen was traveling south on U.S. Highway 83, near McCook, Nebraska, when she observed the defendant's vehicle turn north onto the highway. The officer then observed the vehicle swerve from the roadway onto the shoulder of the road several times, heard the sound of metal on metal, and saw the vehicle "come off of a highway steel reflector post" and continue down on the grass and snow. The officer turned her vehicle around, activated the red lights, and began to follow the defendant's vehicle. While she followed, the defendant's vehicle twice swerved into the oncoming traffic lane. The officer activated her police siren and observed the defendant drive in the oncoming lane for 250 feet and then turn into a farmyard.

The officer followed the defendant into the farmyard and approached the defendant as he stepped out of his vehicle. She asked to see his driver's license, and the defendant handed her a handful of papers, from which she located a Colorado license. As they talked, the officer noticed a strong odor of alcohol, that the defendant held onto the car, and that he had "extreme difficulty" standing without holding onto something. His face was very red, and his eyes were bloodshot. His speech was blurred and hard to understand. He was having difficulty understanding questions. The defendant was asked to submit to a preliminary test but refused to do so.

At that time a second officer, Sgt. Rick Stalder, arrived. After he was apprised of the situation, Sergeant Stalder

informed the defendant that he was under arrest and had to accompany the officers to the station. The defendant refused to leave his property, got into his vehicle, and attempted to shut the door. He then held on to the doorjamb with one hand and the steering wheel with the other. Officer McMullen testified she pulled his fingers from the steering wheel with "a great deal of effort," and Sergeant Stalder pulled him out of the car. Once out of the car, the defendant "went limp and let himself fall to the ground," and the officers were required to expend "a good deal of effort" to handcuff him. When the defendant refused to get up, he was pulled up by the officers and forcibly placed in the patrol car. The defendant's car keys remained in the ignition during the struggle. The officers' testimony as to the circumstances of the arrest was not disputed.

En route to the station, the defendant complained of an injury to his hand and asked to be taken to the hospital. Officer McMullen communicated this request to Sergeant Stalder, who advised her to proceed to the station. Once there, several people examined the defendant's hand while Officer McMullen read the informed consent form to the defendant and asked him to take a breath test. The defendant refused to sign the forms or take the test.

The defendant was then transported to the hospital, where he again refused to submit to a chemical test, and also refused treatment of his hand. He was taken back to the station and placed in jail. About 1 hour later he was taken back to the hospital and treated.

At trial the State presented the officers' testimony and rested. The defendant presented several witnesses who testified they had seen the defendant at various times on the day of his arrest and that he had appeared not to be intoxicated.

The defendant alleged 10 assignments of error but failed to brief 6 of them. Accordingly, our review will be limited to those discussed in his brief. See Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). See, also, *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986).

The defendant first assigns as error the trial court's denial of his motion to suppress all evidence obtained after the defendant was stopped. It is the defendant's position that suppression was

required because the officers failed to give the defendant the *Miranda* warnings when he was arrested. This contention is without merit.

There is no requirement in this jurisdiction that *Miranda* warnings be given prior to a request to submit to a chemical test of blood, breath, or urine. *State v. Klingelhoefer*, 222 Neb. 219, 382 N.W.2d 366 (1986); *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986); *Wiseman v. Sullivan*, 190 Neb. 724, 211 N.W.2d 906 (1973). In addition, under the implied consent law, a driver is not entitled to consult with an attorney, nor is a delay in the test required should a driver request to consult with an attorney. *Fulmer, supra*. Evidence obtained in the implied consent context is not testimonial or communicative and does not fall within the privilege against self-incrimination. *Fulmer, supra*. See, also, *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

The defendant next contends the county court erred in finding that the officers properly entered the defendant's property without a warrant. The defendant argues that the officers should have obtained a warrant for his arrest before entering his property. This contention is not supported by the facts or the law.

Neb. Rev. Stat. § 29-404.02 (Reissue 1985) provides for warrantless arrest if an officer has reasonable cause to believe a person has committed

> (2) A misdemeanor, and the officer has reasonable cause to believe that such a person either (a) will not be apprehended unless immediately arrested; . . . (c) may destroy or conceal evidence of the commission of such misdemeanor; or (d) has committed the misdemeanor in the presence of the officer.

Probable cause for a warrantless arrest exists when, "at the time of the arrest, the officer had knowledge of the facts and circumstances based on reasonably trustworthy information which was sufficient to warrant a prudent man in believing the defendant had committed or was committing an offense." *State v. Evans, ante* p. 64, 67, 395 N.W.2d 563, 566-67 (1986) (citing *State v. Ware*, 219 Neb. 594, 365 N.W.2d 418 (1985)). See, also, *State v. Tipton*, 206 Neb. 731, 294 N.W.2d 869 (1980).

The officers clearly had probable cause to arrest the defendant. Officer McMullen saw the defendant drive erratically, observed him drive over a reflector post, and observed that the defendant appeared to be intoxicated. This was sufficient cause to support the officer's belief the defendant had committed a misdemeanor in her presence: driving while intoxicated. Further, the delay caused by obtaining a warrant could have resulted in the destruction of evidence: the metabolism of the alcohol in the defendant's body. See, *State v. Halligan*, 222 Neb. 866, 387 N.W.2d 698 (1986); *Schmerber v. California, supra*.

The warrantless arrest was not invalid because it occurred on the defendant's property. In *State v. Penas*, 200 Neb. 387, 263 N.W.2d 835 (1978), we held that a warrantless entry is valid if the police officer enters under exigent circumstances such as hot pursuit or the imminent destruction of evidence. This holding was grounded on *United States v. Santana*, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976). In *Santana* the U.S. Supreme Court held that a suspect may not defeat a warrantless arrest which has been set in motion in a public place upon probable cause by the expedient of escaping to a private place. The arrest in *Santana* occurred in the vestibule of the accused's home.

The defendant contends that several recent Supreme Court cases cast doubt on the continued validity of our holding in *Penas*. The cases cited are not applicable here because they involved warrantless arrests in a home in the absence of exigent circumstances. The defendant in this case was arrested in his farmyard after the arresting officer had actively pursued him on the highway for several minutes, with red lights flashing and the siren activated. Further, evidence of the defendant's intoxication would have been lost had the officers waited to obtain an arrest warrant. These facts constituted exigent circumstances which justified the warrantless entry onto the defendant's property.

The defendant next assigns as error the county court's overruling of his motion for a jury trial. The defendant contends he should have been granted a jury trial on each charge.

The defendant was arraigned on January 17, 1985. He was

represented by counsel and informed by the court of his right to a jury trial. Pleas of not guilty were entered and a hearing on motions set for February 14, 1985. A motion for a jury trial was filed and bears a handwritten notation "hand delivered 2-6-85." It is signed by the defendant's attorney. The trial court denied the motion as untimely.

The rules of the county court of the 14th Judicial District of Nebraska (rev. 1984) were introduced into evidence and appear in the record. Rule 25 provides that all demands for a jury trial in misdemeanor cases must be made within 10 days following the entry of a plea of not guilty. The rule draws no distinction between jury trials provided for by statute and those constitutionally required.

The U.S. Constitution, through the due process clause of the 14th amendment, requires the states to provide a trial by jury whenever the 6th amendment would so require if the case were in federal court. *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986). A jury trial is not constitutionally required in every criminal case, but must be provided when the offense is "serious." *Id.* A serious offense is one which carries a maximum penalty in excess of 6 months' imprisonment. *Baldwin v. New York*, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970).

The right to a jury trial is a personal right which may be waived by the defendant. *State v. Miles*, 202 Neb. 126, 274 N.W.2d 153 (1979); *State v. Godfrey*, 182 Neb. 451, 155 N.W.2d 438 (1968), *cert. denied* 392 U.S. 937, 88 S. Ct. 2309, 20 L. Ed. 2d 1396. See, also, Fed. R. Crim. P. 23(a). A voluntary waiver of this right must be express and intelligent. *State v. Miles, supra*. See, also, *Patton v. United States*, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930). Waiver cannot be presumed from a silent record. *State v. Predmore*, 220 Neb. 336, 370 N.W.2d 99 (1985).

The right to a jury trial is also provided by statute. Neb. Rev. Stat. § 24-536 (Reissue 1985) provides that "[e]ither party to any case in county court, except criminal cases arising under city or village ordinances, traffic infractions, and other infractions . . . may demand a trial by jury." A demand is required to invoke the statutory right to a jury trial. *State v. Vernon*, 218 Neb. 539, 356 N.W.2d 887 (1984). A failure to file a

timely request in accordance with the rules of court constitutes a waiver of the statutory right to a jury trial. *Id.* A defendant charged with driving under the influence, pursuant to Neb. Rev. Stat. § 39-669.07 (Reissue 1984), has a right under § 24-536 to demand a jury trial. *State v. Karel*, 204 Neb. 573, 284 N.W.2d 12 (1979).

The defendant was charged with four separate counts. The charge of resisting arrest was filed pursuant to Neb. Rev. Stat. § 28-904 (Reissue 1985). That offense is classified as a Class I misdemeanor, and carries a maximum penalty of 1 year's imprisonment, or a $1,000 fine, or both. Neb. Rev. Stat. § 28-106 (Reissue 1985). It is a serious offense for which a jury trial is constitutionally required unless waived by the defendant. See, *Baldwin v. New York, supra; Patton v. United States, supra.*

There is no showing, on the record, that the defendant waived a jury trial on this matter. To the contrary, the defendant requested a jury trial and was denied it solely on the grounds the request was untimely. Since the record does not show that the defendant knowingly and intelligently waived his right to a jury trial on the charge of resisting arrest, the judgment on count III must be reversed and the cause remanded for a new trial.

The charges of driving while under the influence of drugs or alcohol pursuant to § 39-669.07 and refusing to take a chemical test pursuant to Neb. Rev. Stat. § 39-669.08 (Reissue 1984) are Class W misdemeanors and, for first offense, carry maximum and mandatory penalties of 7 days' imprisonment and fines of $200. § 28-106. They are petty offenses for which a jury trial is not constitutionally required. See *State v. Lynch, supra.* As to these charges, the defendant had only a statutory right to a jury trial, for which a proper demand was required. See, *State v. Karel, supra; State v. Vernon, supra.*

The defendant requested a jury trial February 6, 1985, more than 10 days after his plea of not guilty was entered on January 17, 1985. His request was untimely under the court rules and constituted a waiver of his statutory right to a jury trial on these charges. The county court therefore properly overruled his request for a jury trial on these charges.

The defendant also contends the evidence was insufficient to

support the finding of guilty. As the cause is being remanded on the charge of resisting arrest, we will not review the evidence concerning that count.

In determining the sufficiency of the evidence,

> "[T]his court [will not] resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it."

State v. Ellis, 223 Neb. 779, 783, 393 N.W.2d 719, 722 (1986) (citing *State v. Rolling,* 209 Neb. 243, 307 N.W.2d 123 (1981)). A guilty verdict will not be reversed by this court unless the evidence presented is so lacking in probative force that it is insufficient as a matter of law. *State v. Babajamia,* 223 Neb. 804, 394 N.W.2d 289 (1986).

There was substantial evidence to support the court's finding that the defendant operated a motor vehicle while intoxicated. Officer McMullen testified the defendant drove erratically, appeared intoxicated, and had a strong odor of alcohol about him. Sergeant Stalder testified the defendant was, in his opinion, "very intoxicated." Although the defendant disputed this testimony, it was sufficient to support a conviction for operating a motor vehicle while under the influence of alcohol. See *Wisch v. Jensen*, 221 Neb. 609, 379 N.W.2d 755 (1986).

The finding that the defendant refused to submit to a chemical test is also supported by the record. The test used to determine whether a driver has refused to submit to a test is whether the driver conducted himself in such a way that a reasonable person would be justified in believing the driver had understood he had been asked to take the test but refused to do so. *Bauer v. Peterson*, 212 Neb. 174, 322 N.W.2d 389 (1982). Officer McMullen testified the defendant refused to sign the implied consent form and twice refused to submit to a test of his blood alcohol content. The judgment on that count is affirmed.

We note, as plain error, that the defendant was fined $250 for first offense driving while intoxicated. Section 28-106 provides for a mandatory fine of $200 for this offense. The fine imposed is excessive, and must be reduced to $200. Neb. Rev. Stat.

§ 29-2308 (Reissue 1985). The judgment on count I, as so modified, is affirmed.

The judgment on count I is affirmed as modified. The judgment on count II is affirmed. The judgment on count III is reversed and the cause remanded for a new trial.

JUDGMENT ON COUNT I AFFIRMED AS MODIFIED.
JUDGMENT ON COUNT II AFFIRMED.
JUDGMENT ON COUNT III REVERSED, AND THE CAUSE REMANDED FOR A NEW TRIAL.

ARNOLD J. OSTWALD, JR., APPELLANT, V. CITY OF OMAHA, A METROPOLITAN CITY, AND THE OMAHA PERSONNEL BOARD, APPELLEES.

399 N.W.2d 783

Filed January 23, 1987. No. 85-439.

Municipal Corporations: Public Officers and Employees: Termination of Employment: Controlled Substances. When an employee of the city, whose duties in part are to help apprehend persons using marijuana, himself engages in such activity, such action does constitute an act unbecoming an incumbent of the particular position, does affect the efficient conduct of the business of the city, and is not in the best interest of the city government.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

James E. Schaefer, for appellant.

Herbert M. Fitle, Omaha City Attorney, and Kent N. Whinnery, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

The appellant, Arnold J. Ostwald, Jr., was employed by the communications division, department of public safety, City of Omaha. On April 17, 1984, he was suspended for a period of 15

days, pending termination of employment effective May 2, 1984.

Ostwald had worked as a senior communications operator with the 911 system run by the City of Omaha. The 911 system is considered a support agency of the Omaha Police Division. Specifically, his duties and responsibilities consisted of working an assigned position and overseeing the shift as a supervisor. More specifically, the 911 operators are responsible for advising officers on the streets regarding reported crimes such as marijuana usage.

His suspension and subsequent discharge were as a result of telephone conversations held between Ostwald and his wife, also a 911 operator, concerning the purchase and use of marijuana for their personal consumption. Specifically, Ostwald was suspended and then discharged because he was found to have violated a portion of Omaha Mun. Code, ch. 23, art. II, § 23-291 (1982), which provided in part as follows:

> (j) Commission of acts or omissions unbecoming an incumbent of the particular office or position held, which render his or her reprimand, suspension, demotion or discharge necessary or desirable for the economical or efficient conduct of the business of the city or for the best interest of the city government.

Following his suspension and discharge, Ostwald appealed to the Omaha Personnel Board. The Omaha Personnel Board upheld the suspension and discharge. Ostwald then filed error proceedings in the district court for Douglas County, Nebraska, which also upheld his suspension and termination. It is from that decision which he now appeals to this court.

We have now reviewed the record and conclude that the record establishes that the board acted within its jurisdiction, and its findings are sustained by some competent evidence. We therefore sustain the action of the district court in upholding Ostwald's suspension and termination. See, *Caniglia v. City of Omaha*, 210 Neb. 404, 315 N.W.2d 241 (1982); *Matula v. City of Omaha*, 223 Neb. 421, 390 N.W.2d 500 (1986).

The evidence before the personnel board was uncontradicted. While Ostwald's wife was engaged in performing her duties as an operator of the 911 system, she

phoned Ostwald at home on a telephone which was a part of the 911 system, but which employees were permitted to use. The telephone conversation was known by the employees to be taped, as are all 911 telephone conversations. The telephone conversation makes it clear that Ostwald was apparently attempting to locate marijuana and that his wife was reporting to him that she was having difficulty locating the marijuana. Ostwald does not deny the substance of the conversation, but merely maintains that the use of the telephone for discussing the purchase of marijuana did not affect the efficient conduct of the business of the city and, therefore, should not have resulted in his discharge. In that regard, Ostwald reads the ordinance much too narrowly. We believe that it is clear that when an employee of the city, whose duties in part are to help apprehend persons using marijuana, himself engages in such activity, such action does constitute an act unbecoming an incumbent of the particular position, does affect the efficient conduct of the business of the city, and is not in the best interest of the city government.

Ostwald has simply failed to establish that error was committed by the city in discharging him for engaging in conversation, over the 911 telephone system, for the purpose of purchasing marijuana. The fact that the particular call monitored was initiated by Ostwald's wife rather than by Ostwald does nothing to change that situation. Had Ostwald not been a willing participant, he could have insisted that his wife hang up the phone and discontinue the conversation. Yet the conversation goes on for several minutes, with Ostwald urging his wife to find marijuana for him.

The judgment of the district court is affirmed.

AFFIRMED.

WALLACE F. LESEBERG ET AL., APPELLEES, V. LAVERNE H. MEINTS ET AL., APPELLEES, AND DAVID MEINTS, APPELLANT.
399 N.W.2d 784

Filed January 23, 1987. No. 85-485.

1. **Final Orders: Foreclosure: Appeal and Error.** A decree of foreclosure is a final order for purposes of appeal to this court.
2. **Appeal and Error.** To be considered by this court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred.
3. **Pleadings: Trial: Appeal and Error.** Generally, this court will not consider for the first time on appeal issues not properly raised in the pleadings nor litigated at trial.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

David Meints, pro se.

James G. Sharp of Everson, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellees Leseberg.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This action was brought to foreclose a mortgage upon a tract of land in Gage County, Nebraska. The mortgage was executed and delivered on May 31, 1979, by the defendants Laverne H. and Marilyn Meints, to secure a promissory note in the amount of $127,500 payable to the plaintiffs, Wallace F. and Juanita Leseberg. The note was payable in annual installments of $8,500, commencing June 1, 1980, with a balloon payment of $42,500 due on June 1, 1990. The mortgage secured the promissory note.

When the defendants failed to pay the installments due on the note and the real estate taxes as required by the mortgage, on July 30, 1981, the plaintiffs declared the entire balance of the note due and payable.

A decree of foreclosure was entered on December 13, 1984. The trial court found there was $110,670 due the plaintiffs, that the mortgage was a first lien upon the real estate, and that any claim of the defendant David Meints was subject to the lien of the mortgage.

An order of sale was issued January 3, 1985, and the property sold to the plaintiffs on February 4, 1985. A motion for confirmation was filed on the same day and an order of confirmation entered on February 19, 1985.

On April 23, 1985, the defendant David Meints filed an "application" alleging that the plaintiffs had not complied with Neb. Rev. Stat. §§ 25-1531 (Reissue 1985) and 40-103 (Reissue 1984), and requested that the sale be set aside as required by § 25-1531. The application was heard and overruled on May 15, 1985. David Meints filed a notice of appeal to this court on June 14, 1985.

The only matter brought to this court for review is the ruling on the application filed April 23, 1985. The time for appeal as to all previous orders expired before the notice of appeal was filed on June 14, 1985. See *Schuyler Building & Loan Ass'n v. Fulmer*, 61 Neb. 68, 84 N.W. 609 (1900). See, also, *First Trust Co. v. Eastridge Club*, 134 Neb. 785, 279 N.W. 720 (1938); *France v. Bell*, 52 Neb. 57, 71 N.W. 984 (1897).

In his brief, David Meints makes three assignments of error: (1) The plaintiffs failed to adhere to the truth in lending provisions for disclosure of credit terms, entitling the defendants to avoid the terms of the mortgage and note; (2) The contract was unconscionable for failure to balance the protection of the parties against circumstances out of their control; and (3) To the extent of any failure to perform on the contract, avoidable or not, the plaintiffs ought to foreclose and obtain control of only their remaining interest in the land. None of the assignments of error relate to the application to set aside the sale. Instead, they relate to the validity of the decree of foreclosure.

The only issue raised by the application was whether David Meints received proper notice regarding homestead exemption procedures as required by § 25-1531. No error has been assigned as to the overruling of the application and the rejection of the appellant's contention that he did not receive proper notice prior to the sale.

"To be considered by this court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred." *Fee v. Fee*, 223 Neb. 128, 134, 388 N.W.2d 122,

126 (1986).

The only record filed in this court is a transcript of the pleadings and orders filed in the district court. Because there is no bill of exceptions, there is no evidence upon which to review the ruling on the application, and we are unable to determine that the issues raised on appeal were ever litigated in the lower court. The documents in the transcript indicate that these issues were not raised in the application to set aside the sale. The pleadings, motions, and orders relevant to the decree of foreclosure and confirmation of sale indicate that these issues were not raised in those proceedings.

Generally, this court will not consider for the first time on appeal issues not properly raised in the pleadings nor litigated at trial. *Armstrong v. Hartford Life Ins. Co.*, 219 Neb. 128, 361 N.W.2d 511 (1985).

For these reasons, the errors assigned are without merit, and the judgment of the trial court is affirmed.

AFFIRMED.

ROBERT MATZKE ET AL., APPELLEES, V. WALTER HACKBART ET AL., APPELLANTS.

399 N.W.2d 786

Filed January 23, 1987. No. 85-567.

1. **Boundaries.** In an action to establish a boundary line in accordance with Neb. Rev. Stat. § 34-301 (Reissue 1984), one need not present a survey that qualifies as an official record of survey under Neb. Rev. Stat. § 81-8,122.01 (Cum. Supp. 1986).
2. **Adverse Possession: Boundaries.** Proof of the adverse nature of the possession of the land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description.
3. **Adverse Possession: Appeal and Error.** In determining whether a claimant of title by adverse possession met the required burden of proof, we review the record de novo and reach conclusions independent of the trial judge.
4. **Adverse Possession.** A claim of title by adverse possession must be proved by a preponderance of the evidence.

5. **Adverse Possession: Boundaries.** Where an exact metes and bounds description is impossible to ascertain from the record, the failure to adequately describe the proposed boundary is fatal to a claim of adverse possession.
6. _____: _____. A claimant of title by adverse possession must describe the land adversely possessed in an exact and definite manner.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

Blevens, Blevens & Jacobs, for appellants.

Larry L. Brauer of Allan, Brauer & Mullally, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

The Matzkes, the plaintiffs-appellees, brought this action in the district court for Seward County to settle a boundary dispute with their neighbors to the north, the Hackbarts, as provided under Neb. Rev. Stat. § 34-301 (Reissue 1984). The district court ordered the boundary to be established at a line consistent with the survey presented by the appellees. The Hackbarts appeal.

The first assignment of error by the appellants is that the district court erred in not establishing the boundary line at an ancient fence line and that removal of a fence does not forfeit the land previously adversely possessed. The second asserted error is that the district court erred in holding the appellants had not proved adverse possession. The third is that the district court "erred in ignoring the easement for access and right-of-way granted by the State for the benefit of the appellants." We affirm the district court's order due to a failure of the appellants to describe the extent of the land allegedly adversely possessed with sufficient particularity to enable a judgment to be entered upon description.

While negotiating a purchase of the land to the south of the Hackbarts' property in 1984, the Matzkes had a survey conducted to determine the perimeters of the land. The survey stake on the east end of the north line was placed in the middle of a driveway used by the Hackbarts to enter their southern 40 acres. Walter Hackbart considered the survey stakes to be too

far north. He pulled up the stakes and drove them in where he believed the line to be. Due to the boundary line dispute, the Matzkes negotiated a $1,500 reduction of the purchase price which was calculated by prorating the cost of the contested acreage. Robert Matzke testified that the reduction reflected his concern of an impending lawsuit and was not the result of purchasing less property than the deed described.

On January 11, 1985, the Matzkes filed a petition in the district court for Seward County requesting a judgment establishing a permanent boundary line at the survey line. The Hackbarts' answer claimed that they had adversely possessed for more than 10 years land south of the survey line and that the permanent boundary line should be established at an ancient fence line. The Hackbarts also cross-petitioned, praying that title to the contested strip of land be quieted and confirmed in them.

At the time of trial Walter Hackbart testified that he was 64 years old and had been born on the farm, which had been in his family for three generations. He farmed the property his whole life, except for a short period of time when he was in the service. For as long as he could remember, and for a period exceeding 10 years, an ancient fence marked the southern boundary of his property and the northern edge of the land then owned by William Reber, which eventually came to be owned by the Matzkes.

According to Hackbart, for years he plowed away from the fence and Reber plowed toward the fence, which created a ridge or dropoff at the fence line. Approximately 7 years before the trial the fence was taken down to clear away brush and grade out some trees, but the ridge remained, as did some trees on the east end of the fence line. At the time of trial a ridge was evident only on the eastern one-third of the disputed strip of land.

At trial the appellees, the Matzkes, presented exhibit 1, a copy of a survey prepared by Dennis Simonds, the Seward County surveyor. In their brief the appellees represent exhibit 1 to be an official record of survey and therefore entitled to be considered to be presumptive evidence of the facts stated within the survey, as authorized by Neb. Rev. Stat. § 81-8,122.01 (Cum. Supp. 1986). Section 81-8,122.01 requires that official

records of survey be filed in the survey record repository within 90 days of the completion of the survey. Exhibit 1 does not, on its face, reflect that it was timely filed or that it was ever filed, and Simonds' testimony that he filed the survey is not competent evidence of a timely, proper filing. Therefore, we do not consider exhibit 1 to be an official record of survey or afford it the legal presumption provided for in § 81-8,122.01 as the appellees urge us to do.

However, § 34-301 does not require that an official record of survey be presented to the court. It requires that the plaintiff's petition describe the land "as accurately as may be." The testimony of Simonds and the copy of his survey sufficiently establish the factual basis for the description contained in the petition. Since the results of the survey are uncontroverted, there can be no question that the Matzkes sustained their burden of proof with respect to where the boundary line should be, absent proof that the boundary is elsewhere due to adverse possession by the Hackbarts.

The Hackbarts' first and second assignments of error essentially voice the same concern. Whether the district court erred in not establishing the boundary at the old fence line is dependent upon whether the court erred in finding that the appellants did not sustain the burden of proof required to establish title to the land up to a line alleged to be an ancient boundary line. The Hackbarts' position is that they met their burden of proof with respect to adverse possession by proving actual, continuous, exclusive, notorious, and adverse possession of the strip of land for the statutory period of 10 years. See *Hardt v. Eskam*, 218 Neb. 81, 352 N.W.2d 583 (1984). However, proof of the adverse nature of the possession of the land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description. *Steinfeldt v. Klusmire,* 218 Neb. 736, 359 N.W.2d 81 (1984); *Petsch v. Widger,* 214 Neb. 390, 335 N.W.2d 254 (1983); *Layher v. Dove,* 207 Neb. 736, 301 N.W.2d 90 (1981).

In *Pokorski v. McAdams*, 204 Neb. 725, 285 N.W.2d 824 (1979), this court adopted the rule as stated in 2A C.J.S.

Adverse Possession § 264 (1972):

> "A claimant of title by adverse possession must further show the extent of his possession, the exact property which was the subject of the claim of ownership, that his entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to found a verdict upon the description."

204 Neb. at 731, 285 N.W.2d at 827. In determining whether the appellants met this burden of proof, we review the record de novo and reach conclusions independent of the trial judge. *Steinfeldt v. Klusmire, supra; Weiss v. Meyer*, 208 Neb. 429, 303 N.W.2d 765 (1981). The appellants must prove their case by a preponderance of the evidence. *Layher v. Dove, supra; Weiss v. Meyer, supra.*

In its order establishing the boundary at the line described by plaintiffs' exhibit 1, the district court found that

> [i]t is impossible to formulate a metes and bounds description of the area claimed by the defendants from the evidence or from permanent relevant landmarks. To do so would require speculation and conjecture.
>
> Defendants have failed to sustain their burden of proof to gain title by adverse possession, and their cross-petition must be and is hereby dismissed with prejudice.

Our review of the record leads us to the same conclusion as that of the district court, that the Hackbarts failed to describe with certainty where the fence used to be.

As to the east end of what Walter Hackbart felt should be his southern boundary, he testified that the corner was at the entry point of his easement from the south and that when he removed the fence, he had left some trees at the east end. Hackbart also testified that an original fencepost still stood at the east end, although Robert Matzke testified the pole was erected after the boundary dispute started and Simonds, the surveyor, testified that he did not observe any fenceposts at the time he made his survey. A ridge approximately 8 to 12 inches high was visible on the eastern one-third of the property. No permanent landmarks of any sort marked the west end of the original fence line.

Hackbart stated that Elsie Gerkensmeyer's (neighbor to the east) ancient fence, still standing at the time of trial, was in a line

with where his fence used to be. However, the neighbor's fence cannot be used to determine the western corner by extrapolation. The record contains no descriptions whatsoever of the placement of the neighbor's fence that are in any way related to the strip of land in question. The record contains no evidence establishing where the boundary would be if one extended the line created by the neighbor's fence by some reliable and mathematically accurate means, nor is there any evidence of an attempt to do so.

Cross-examination of Hackbart about where he considered the line to be proceeded as follows:

> Q. . . . [H]ow many feet south of the survey line is . . . the east end?
>
> A. On the east end it's 13 foot.
>
> Q. On the west end it's ten feet?
>
> A. Ten feet.
>
> Q. Is that exactly ten feet and exactly 13 feet?
>
> A. No, it is not.
>
> Q. How do you know?
>
> A. That is my estimate. I have never measured it off. That was my estimate.

Nowhere in the record does the appellant Walter Hackbart reveal how he derived his estimation that the west end was 10 feet south of the survey line. Neither does he ever describe any part of the western two-thirds of his proposed boundary line with any more particularity than the guesses made in the excerpt above.

The last illustration of where the fence line used to be to be dealt with is testimony by Walter Hackbart that he farmed due west from the entry point of the easement. The survey line runs east and west; by the appellants' own estimation, their proposed boundary line is not parallel to the survey line. This attempt tends to contradict rather than clarify the other representations of the location of the fence line.

The boundary dispute in *Layher v. Dove*, 207 Neb. 736, 301 N.W.2d 90 (1981), was similar to the instant case in several ways. An ancient fence had been removed, leaving only a few posts on the west bank of the creek. There was a partial ridge on the old fence line resulting from leveling that was essentially

undisputed as the old boundary for the length of its distance. The survey was received into evidence, and its correctness was uncontradicted, just as in the present case. The claim of title by adverse possession was denied because the claimant's evidence, much like the evidence in this case, first of all failed to establish where the specific boundary line was, and secondly, failed to describe the land so as to enable the court to enter a verdict upon the description.

In *Petsch v. Widger*, 214 Neb. 390, 397, 335 N.W.2d 254, 259 (1983), which also involved a boundary dispute due to a removed fence, we considered the language in *Layher v. Dove, supra*, to indicate "that a description must not only be sufficient to found a verdict on but must also be *'exact' and 'definite.'* " (Emphasis supplied.) The claimants by adverse possession in *Petsch* were unable to prove the exact location of the original fence. For that reason, and others, their claim was denied.

In this case the clearest of the descriptions presented is an admitted estimation, with no factual basis expressed in the record. An exact metes and bounds description is impossible to ascertain from the record, and the appellants' failure to adequately describe their proposed boundary is fatal to their claim of adverse possession. *Steinfeldt v. Klusmire*, 218 Neb. 736, 359 N.W.2d 81 (1984). The assigned errors are without merit because the appellants have not met their burden of proof so as to entitle them to have the boundary declared to be at the place of the old fence line.

The last assignment of error to be addressed is the appellants' assertion that the district court "erred in ignoring the easement for access and right-of-way granted by the State for the benefit of appellants."

The Hackbarts' farm was divided by Interstate 80 in 1963. As a result, access from the north to the "southern 40" was cut off, and the southern parcel was landlocked. The Hackbarts owned a piece of land southeast of the southern 40 that had the vertex of its northwestern corner at the same point as the vertex of the southern 40's southeastern corner. Elsie Gerkensmeyer, who owned the land to the east of the southern 40, sold a small triangle-shaped piece of land from her southwest corner to the

State of Nebraska. The state, in turn, granted an easement to the Hackbarts allowing them ingress and egress from the southern 40.

The deed from Gerkensmeyer to the State of Nebraska and the grant of an easement from the state to the Hackbarts were both received into evidence.

The assignment of error is unclear as to what is actually being complained of, although a review of Walter Hackbart's testimony leads us to believe the appellants' complaint might be that the easement indicates the survey is wrong or that the boundary as established by the district court has the effect of denying the Hackbarts access to their southern 40 because the easement does not reach the ordered boundary. We find no error in either regard.

First of all, Walter Hackbart testified that the surveyor put a survey stake in the middle of his easement and that the land the easement is on is owned by the State of Nebraska. He testified that the easement was marked out for him by the State of Nebraska surveyors. Yet, he did not have the land resurveyed to show the appellees' survey was in error. When asked if he had a copy of the state's survey at trial, he declared he did not have it with him.

The Simonds survey indicates that the old fence was erected in the wrong place. Absent a conflicting survey or other evidence that the easement is actually in the place described by the deed to the state and the grant to Hackbarts, we must assume that the survey is correct and their easement lies elsewhere. There is no error in this regard.

With respect to the fact that the new boundary may deny the Hackbarts access to their property, their cross-petition contained a claim of adverse possession. It did not request in the alternative that the court grant the appellants a prescriptive easement due to their continuous use of the strip since 1963. The Matzkes had not denied them access as of the time of trial, and although we find that the appellants did not prove their case of adverse possession, we do not speak as to the merits of a possible claim for an easement across the appellees' land, since that is not the case that is before us. It was not error for the district court to be silent regarding the easement granted to the

appellants.

Having reviewed the record and finding no error, we affirm the district court's order establishing the boundary line at the place described in appellees' exhibit 1, the survey conducted by Simonds.

AFFIRMED.

SCHOOL DISTRICT NO. 46, SARPY COUNTY, NEBRASKA, AND DAVID K. KENTSMITH, APPELLANTS, V. CITY OF BELLEVUE AND BELLEVUE SCHOOL DISTRICT, SARPY COUNTY, NEBRASKA, APPELLEES.

400 N.W.2d 229

Filed January 23, 1987. No. 85-639.

1. **Schools and School Districts: Actions: Boundaries: Standing.** Notwithstanding that the statute provides that a school district is a body corporate, possesses the usual powers of a corporation for public purposes, and may sue and be sued, it is the law of this state that a school district may not maintain an action involving a change in the boundaries of a school district.
2. **Statutes: Constitutional Law: Appeal and Error.** If the statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end.
3. **Legislature: Statutes: Constitutional Law.** If the legislature has made a reasonable classification, one that is not a mere cloak or cover for an arbitrary exemption of certain persons or a certain class of persons, but a natural and proper selection of those who, upon a reasonable view of the mischiefs to be met, should be subject to the regulations prescribed, and the law is made to operate generally and uniformly upon all of the class so constituted, the constitutional provision in question is not violated.
4. **Schools and School Districts: Boundaries: Legislature.** The fixing of boundaries of school districts is exclusively a legislative function, and it may be properly delegated to a subordinate agency, providing the Legislature prescribes the manner and the standards under which the power of the designated board may be exercised. The Legislature may delegate this authority provided it states the purpose for doing so and sets up reasonable standards to guide the agency which is to administer it.

Appeal from the District Court for Sarpy County: LAWRENCE CORRIGAN, Judge. Affirmed.

L. Bruce Wright and Kathleen A. Jaudzemis of Cline, Williams, Wright, Johnson & Oldfather, for appellants.

John E. Rice, Bellevue City Attorney, for appellee City of Bellevue.

Dixon G. Adams, for appellee Bellevue School District.

KRIVOSHA, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and CHEUVRONT, D.J.

KRIVOSHA, C.J.

The question presented by this appeal is whether the provisions of Neb. Rev. Stat. § 79-801(4) (Cum. Supp. 1984) are unconstitutional for any of the various reasons alleged by the appellants, school district No. 46 of Sarpy County and David K. Kentsmith. The district court for Sarpy County, Nebraska, found, in effect, that § 79-801(4) did not violate either the U.S. Constitution or the Constitution of the State of Nebraska by sustaining demurrers filed by the appellees, the Bellevue School District and the City of Bellevue. For reasons more particularly set out hereinafter, the judgment of the district court is affirmed.

Section 79-801(4) provides as follows:

> Whenever an application for approval of a final plat or replat is filed for territory which lies within the zoning jurisdiction of a city of the first or second class and does not lie within the boundaries of a Class IV or V school district, the affected school board of the city district or its representative and the affected school board or boards serving the territory subject to the final plat or replat or their representative shall meet within thirty days of such application and negotiate in good faith as to which district shall serve the platted or replatted territory and the effective date of any transfer based upon the criteria prescribed in subsection (2) of this section.
>
> If no agreement has been reached prior to the approval of the final plat or replat, the territory shall transfer to the

school district of the city of the first or second class upon the filing of the final plat unless an affected district petitions the district court within ten days of approval of the final plat or replat and obtains an order enjoining the transfer and requiring the affected school boards to continue negotiation. The court shall issue the order upon a finding that the affected board or boards have not negotiated in good faith based on one or more of the criteria listed in subsection (2) of this section. The district court shall require no bond or other surety as a condition for any preliminary injunctive relief. If no agreement is reached after such order by the district court and additional negotiations, the platted or replatted territory shall become a part of the school district of the city of the first or second class.

Section 79-801(2) provides in part:

During the process of negotiation, the affected school boards shall consider the following criteria:

(a) The educational needs of the students in the affected school districts;

(b) The economic impact upon the affected school districts;

(c) Any common interests between the annexed or platted area and the affected school districts and the community which has zoning jurisdiction over the area; and

(d) Community educational planning.

The undisputed evidence is that school district No. 46 and the Bellevue School District are both Class III school districts located in Sarpy County, Nebraska, and share a common boundary line. The City of Bellevue is a city of the first class, and the zoning jurisdiction of the City of Bellevue extends for a distance of 2 miles beyond the city limits and into the territory served by school district No. 46. Similarly, by definition as a Class III school district, school district No. 46 also must have a city or village in it which has extraterritorial zoning powers. See § 79-801(1).

On April 11, 1985, an application for final plat was filed, seeking to replat a number of lots in Normandy Hills

subdivision, which is located in school district No. 46, south of the Bellevue School District's southernmost boundary. While the subdivision lies wholly outside the boundaries of the City of Bellevue and also outside the boundaries of the Bellevue School District, the subdivision does lie within the zoning jurisdiction of the City of Bellevue. This application triggered the transfer of the property out of school district No. 46 and into the Bellevue School District pursuant to the provisions of § 79-801(4). A request was made by the Bellevue School District to school district No. 46 to negotiate, as provided by § 79-801(4). District No. 46, however, chose not to negotiate and, instead, filed an action in the district court for Sarpy County, Nebraska, seeking an injunction and a declaration that § 79-801(4) is unconstitutional. This is not the same injunction which might have been obtained if good faith negotiations had not been conducted as provided by § 79-801(4). The district court determined that the act was not unconstitutional. It is from that order that this appeal is now taken.

Before proceeding to address the constitutional issue, we are required to first address the question of whether school district No. 46 is a proper party to this action. We believe it is not. In the case of *Board of Education v. Winne*, 177 Neb. 431, 434-35, 129 N.W.2d 255, 257-58 (1964), quoting from *Halstead v. Rozmiarek*, 167 Neb. 652, 94 N.W.2d 37 (1959), we said:

> "In reference to the assertion of appellees that the proposed change of boundaries would affect the Baker district because it would deprive it of a part of its territory and this would result in a decrease of the amount and value of the taxable property in the district and would cause an increase of the tax burden upon the remaining property therein, it may be appropriately said that notwithstanding the statute provides that a school district is a body corporate, possesses the usual powers of a corporation for public purposes, and may sue and be sued, it is the firmly established law of this state that a school district may not maintain an action involving a change in the boundaries of a school district. A school district in this state has no territorial integrity. It is subject to the reserve power of the state exercised through

> administrative authority to change its territory according to current educational needs and good educational principles. The state may change or repeal all powers of a school district, take without compensation its property, expand or restrict its territorial area, unite the whole or a part of it with another subdivision or agency of the state, or destroy the district with or without the consent of the citizens."

It therefore follows that if a school district may not question a change in boundary, it also may not attack the law which prescribes how and in what manner those boundaries shall be changed. School district No. 46 has no legal interest in the question presented by the case and, therefore, no standing to raise the constitutional issues set out in its petition.

The situation in regard to the additional appellant, Kentsmith, is, however, another matter. By his petition he first alleges that he is a resident, property owner, and taxpayer of school district No. 46. He then alleges in his first cause of action that the transfer of the land will "cause great damage . . . to Kentsmith from loss of tax support and student population . . . ." He further alleges in his third cause of action that "[a]s a property owner whose property is taxed to support School District No. 46, Kentsmith's financial burden would be increased if the replatted territory is transferred from School District No. 46 to School District of Bellevue." He further alleges that he "received no notice from and has been afforded no hearing by the City or by the School District of Bellevue regarding the transfer . . . ." These are all allegations made on his own behalf and not on behalf of school district No. 46. To this petition the City of Bellevue and the Bellevue School District demurred. While the allegations do not entitle Kentsmith to any relief, they are, nevertheless, sufficient to give him standing to sue. It is *his* tax burden which he alleges will be affected by the transfer, and his property which will be "injured" by the transfer.

In *Farrell v. School Dist. No. 54*, 164 Neb. 853, 868, 84 N.W.2d 126, 136 (1957), we said:

> "A court of equity will, on the application of resident taxpayers, restrain public officers from doing an illegal

> act where the effect of such act, if consummated, would be a waste of public funds raised by taxation." See, also, McLain v. Maricle, 60 Neb. 353, 83 N.W. 85; [citation omitted].

In *Lindeman v. Corson*, 93 Neb. 548, 550, 141 N.W. 153, 154 (1913), we said:

> "In an action by injunction, brought to restrain officers of a school district from removing to another location a schoolhouse situated in said district, the right of plaintiffs to maintain the action is established, if it appears that they are resident taxpayers of the district, and the proposed removal, if unauthorized, would involve a waste and an unwarranted expenditure of public funds; and no other or greater interest need be shown."

See, also, *Hess v. Dodge*, 82 Neb. 35, 116 N.W. 863 (1908).

While we do not find that Kentsmith's claims are meritorious, we perceive of no reason why, if one who is a taxpayer and resident may seek an injunction on a claim that the act to be performed is illegal, he or she does not have standing to seek an injunction when he or she alleges that he or she is a resident taxpayer who is about to be injured by reason of the fact that an unconstitutional act is about to be performed. Kentsmith does, therefore, have standing to sue, and we are therefore required to review his constitutional claims.

Specifically, Kentsmith claims that § 79-801(4) is in violation of the Constitutions of both the United States and the State of Nebraska for one or more of the following reasons: (1) It violates Neb. Const. art. I, § 1, and art. III, § 18, and the 14th amendment to the U.S. Constitution; (2) Section 79-801(4) is an unconstitutional delegation of legislative power; and (3) Section 79-801(4) denies to patrons of school district No. 46 due process, in violation of Neb. Const. art. I, § 3, and the 14th amendment to the U.S. Constitution. We shall address each of these claims in the order in which they have been raised.

I. *Section 79-801(4) constitutes special legislation, in violation of Neb. Const. art. III, § 18, and the equal protection guarantees of both the federal and state Constitutions.*

Kentsmith argues that § 79-801(4) is special legislation because it has granted to certain Class III school districts, such

as the Bellevue School District, certain rights which are denied to other Class III school districts, such as school district No. 46. We believe that not to be the case. An examination of the act discloses that all Class III school districts have been granted the same rights and that, therefore, there is no special class created. Section 79-801 provides that a Class III school district shall be a district which is embraced within the corporate limits of each incorporated city or village, together with such additional territory and additions to such city or village as may be added thereto where the city or village has a population of more than 1,000 and less than 100,000. All such villages or cities have extraterritorial zoning jurisdiction, although the distances may vary depending upon the class of the city or village. Neb. Rev. Stat. § 15-902 (Supp. 1985) (3 miles for city of primary class); Neb. Rev. Stat. § 16-901 (Reissue 1983) (2 miles for city of first class); Neb. Rev. Stat. § 17-1001 (Reissue 1983) (1 mile for city of second class and villages). In the instant case both school district No. 46 and the Bellevue School District have as their principal location a city or village having a population of more than 1,000 and less than 100,000, because unless school district No. 46 has within its boundaries a city or village having a population of more than 1,000 and less than 100,000, it cannot be a Class III school district. As a result, both school district No. 46 and the Bellevue School District have the right, whenever an application for approval of a final plat is filed regarding property which is located within the zoning jurisdiction of the city or village and which is also located within the respective school district, to annex to the school district the land included in the area for which the final plat or replat is sought. The fact that the specific land involved in this action lies only within the zoning jurisdiction of the City of Bellevue, and, therefore, the Bellevue School District, does not make the act class legislation. By the same token, if the final plat involved land lying within the zoning jurisdiction of the city or village which permits school district No. 46 to be a Class III school district, school district No. 46 would have the right to cause the transfer of such land to become a part of its school district.

The fact that in the instant case school district No. 46 must yield to the Bellevue School District does not make the

classification unlawful. The test is not whether a particular entity may exercise a right in a given situation but, rather, whether the class is so constructed that other entities may exercise rights and be a part of the class if they acquire the necessary characteristics and meet the necessary prerequisites.

Whenever a plat or replat is filed within the zoning jurisdiction of the city or village having a population of more than 1,000 and less than 100,000 inhabitants, a Class III school district which serves that city or village may exercise the rights granted Class III school districts under the provisions of § 79-801. There is no distinction between "urban Class III" school districts and "rural Class III" school districts, as suggested by Kentsmith. All Class III school districts have the same characteristics and are afforded the same rights under § 79-801(4). The argument that this is special legislation or that a separate class within Class III school districts has been created is simply not supported by the facts. See, also, *Hunzinger v. State*, 39 Neb. 653, 58 N.W. 194 (1894). There is simply no basis to Kentsmith's claim that there is an improper class created by the provisions of § 79-801(4) and, therefore, no basis to the argument that § 79-801(4) violates either Neb. Const. art. I, § 1, or art. III, § 18, or the 14th amendment to the U.S. Constitution.

II. *Section 79-801(4) denies to persons within school district No. 46 equal protection of the law.*

Nor is there any basis for contending that the statute denies to the persons within school district No. 46 equal protection of the law. We have previously held that in analyzing equal protection claims in the social and economic context for claims which do not involve suspect classes or fundamental rights, if there exists such classification, the court uses the "rational basis test." In *State v. Michalski*, 221 Neb. 380, 385, 377 N.W.2d 510, 515 (1985), we said:

> [I]f the statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939, 59 L. Ed. 2d 171

(1979); *New Orleans v. Dukes*, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976). Upon a showing of a rational relationship between means and ends, courts will find such legislation constitutionally healthy.

And, earlier, in *McDonald v. Rentfrow*, 176 Neb. 796, 800-01, 127 N.W.2d 480, 483-84 (1964), we said:

> "[I]f the legislature has made a reasonable classification, -not a mere cloak or cover for an arbitrary exemption of certain persons or a certain class of persons, but a natural and proper selection of those who, upon a reasonable view of the mischiefs to be met, should be subject to the regulations prescribed, -and the law is made to operate generally and uniformly upon all of the class so constituted, the constitutional provision in question is not violated."

Kentsmith's principal argument seems to be that persons in "rural Class III school districts" are treated differently and unfairly as compared to persons in "urban Class III school districts." As we have already noted, § 79-801(4) does not make such an urban versus rural classification, but, rather, all Class III school districts are treated equally.

Furthermore, even if the Legislature had created classifications between Class III school districts, we have previously held that the state has a rather obvious interest in providing for the orderly expansion of cities and villages and corresponding school districts principally located within such cities and villages. See *Northwest High School Dist. No. 82 v. Hessel*, 210 Neb. 219, 313 N.W.2d 656 (1981). This court is simply unable to say that there is no rational basis for suggesting that as a city acquires zoning jurisdiction over land, the school district principally located within the city or village should not have first right to provide for the educational needs of the people in that plat. In fact, in most instances the land will not only be within the city's zoning jurisdiction but, after a time, within the corporate limits itself. The district court was correct in refusing to find that § 79-801(4) denied to persons within school district No. 46 the equal protection of the law.

III. *Section 79-801(4) is an unconstitutional delegation of legislative power.*

We have previously addressed this question and rejected such argument. In *McDonald v. Rentfrow, supra* at 800, 127 N.W.2d at 483, we said:

> The fixing of boundaries of school districts is exclusively a legislative function, and it may be properly delegated to a subordinate agency, providing the Legislature prescribes the manner and the standards under which the power of the designated board may be exercised. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N.W.2d 566; Schutte v. Schmitt, 162 Neb. 162, 75 N.W.2d 656; Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N.W.2d 119. Stated more precisely this court said in Schutte v. Schmitt, *supra*: "The Legislature may delegate this authority provided it states the purpose for doing so and sets up reasonable standards to guide the agency which is to administer it." See, also, School Dist. No. 39 v. Decker, 159 Neb. 693, 68 N.W.2d 354; Nickel v. School Board of Axtell, *supra*; § 79-420, R.S. Supp., 1961.

An examination of § 79-801(4) clearly provides those standards. The mechanism which triggers the transfer is clearly prescribed by statute. Furthermore, the criteria which are to be used in negotiating the transfer are set out by § 79-801(2). Finally, the act also provides that if the parties are unable to negotiate in accordance with the standards, then the school district located within the village or city having zoning jurisdiction over the land in question shall acquire the land and make it a part of its school district. There are certainly limits to the school district's discretion in that scheme. We, again, believe that the district court was correct in its determination.

IV. *Section 79-801 violates due process rights because it does not provide for notice and a hearing.*

We have, likewise, addressed this issue and held to the contrary. In *Nickel v. School Board of Axtell*, 157 Neb. 813, 825-26, 61 N.W.2d 566, 574 (1953), we said:

> Questions of public policy, convenience, and welfare, as related to the creation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, or any change in the boundaries thereof, are,

in the first instance, of purely legislative cognizance and, when delegated to any public body having legislative power, any action in regard thereto does not come within the due process clause of either the state or federal Constitutions. See, Searle v. Yensen, 118 Neb. 835, 226 N.W. 464, 69 A.L.R. 257; Ruwe v. School District, *supra*; Nebraska Mid-State Reclamation Dist. v. Hall County, *supra*; Seward County Rural Fire Protection Dist. v. County of Seward, *supra*.

But when, as a condition to their creation or change, the public body to which such authority is delegated must find certain facts to exist upon which the Legislature has said depends its authority to declare such subdivision, or any change therein, to exist then the questions presented are of a quasi-judicial character. In such cases a hearing must be had to determine if such facts exist and proper notice thereof must be provided for and given to all parties interested therein. See, Searle v. Yensen, *supra*; Ruwe v. School District, *supra*.

In the present case the school districts are not required to find certain facts before they have authority to act. The triggering mechanism is the filing of a request for the acceptance of a plat or replat. Once that application for approval is filed, the two districts are required to negotiate. There is no quasi-judicial function delegated to the school districts in this regard, and there are no findings to be made concerning the request for approval of a final plat or replat. The fact of the existence of a request for approval of a final plat or replat becomes evident and apparent once the application is filed. Thereafter, the process becomes completely mechanical. The filing of the application triggers the act, and no findings by the school districts are required or made. Consequently, the requirement for the attachment of due process rights does not exist.

For the foregoing reasons we conclude that the district court was correct in its conclusion that § 79-801(4) does not violate either the U.S. Constitution or the Constitution of the State of Nebraska. The request for an injunction should have been denied on the basis requested, and the demurrers, therefore, were correctly sustained. The judgment is affirmed.

AFFIRMED.

SHANAHAN, J., concurring.

While reaching a correct result regarding school district No. 46, the majority has overlooked some basic premises and principles of constitutional law. The majority states: "School district No. 46 has no legal interest in the question presented by the case and, therefore, no standing to raise the constitutional issues set out in its petition."

In these proceedings the plaintiffs' petition commences: "COME NOW the plaintiffs, School District No. 46 . . . and David K. Kentsmith . . . and for *their* causes of action . . . ." (Emphasis supplied.) The petition then sets out six causes of action, one of which claims that Neb. Rev. Stat. § 79-801 (Cum. Supp. 1984) violates "the equal protection clauses of the United States Constitution and the Nebraska Constitution" (sixth cause of action) and requests a declaration that § 79-801 is unconstitutional, while another cause of action asserts that § 79-801, possibly reducing the school district's tax revenue and number of pupils, is "special legislation" in violation of Neb. Const. art. III, § 18 (first cause of action), and is, therefore, unconstitutional.

Among the safeguards of the 14th amendment to the U.S. Constitution is the "equal protection" clause, namely: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." Neb. Const. art. I, § 1, provides: "All persons are by nature free and independent, and have certain inherent and inalienable rights . . . ." Further, according to Neb. Const. art. III, § 18: "The Legislature shall not pass local or special laws . . . [g]ranting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . ." As this court expressed in *City of Plattsmouth v. Nebraska Telephone Co.*, 80 Neb. 460, 464, 114 N.W. 588, 590 (1908): "A special privilege in constitutional law is a right, power, franchise, immunity or privilege granted to, or vested in, a person or class of persons to the exclusion of others and in derogation of common right."

Recently, we pointed out:

> The 14th amendment to the U.S. Constitution prohibits a state from, among other things, denying any person

> equal protection of the laws and from depriving any person of property without due process of law.
>
> Article I, § 1, of the Nebraska Constitution does not concern itself with equal protection of the laws. It is article III, § 18, which deals with disparate treatment by concerning itself with special legislation.

Porter v. Jensen, 223 Neb. 438, 443, 390 N.W.2d 511, 515 (1986).

A school district has been judicially recognized as a species of municipal corporation. See *Nickel v. School Board of Axtell*, 157 Neb. 813, 61 N.W.2d 566 (1953). There is a definite difference between a business corporation and a municipal corporation, a distinction recognized by the Supreme Court of Missouri in *St. Louis v. Smith*, 325 Mo. 471, 477, 30 S.W.2d 729, 730 (1930):

> [A business corporation is] organized for the purpose of carrying on a business for profit; while [a municipal corporation] is organized with political and legislative powers for the local civil government and police regulation of the people of a particular district included within its boundaries; and that it is a subordinate branch of the domestic government of a state.

This court has employed a definition for *association*, namely, " 'The act of a number of persons in uniting together for some purpose. The persons so joining.' " *In re Estate of Sautter*, 142 Neb. 42, 52, 5 N.W.2d 263, 268 (1942).

A municipal corporation, as a subdivision of a state, is not a "person" guaranteed equal protection of the laws. See, *Bd. Comm'rs v. Kokomo City Plan Comm.*, 263 Ind. 282, 330 N.E.2d 92 (1975); *Shelby v. City of Pensacola*, 112 Fla. 584, 151 So. 53 (1933); *Warren County, Mississippi v. Hester*, 219 La. 763, 54 So. 2d 12 (1951). As expressed by Justice Cardozo in *Williams v. Mayor*, 289 U.S. 36, 40, 53 S. Ct. 431, 77 L. Ed. 1015 (1932): "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."

Other jurisdictions have specifically held that a school district, being neither a natural nor artificial person, but being a

legislative creation, is not a "person" within the meaning of any bill of rights or constitutional limitation. See, *Ind. Sch. Dist. v. Board*, 230 Iowa 924, 299 N.W. 440 (1941); *Grasko v. Los Angeles City Board of Education*, 31 Cal. App. 3d 290, 107 Cal. Rptr. 334 (1973); *Dean v. Armstrong*, 246 Iowa 412, 415, 68 N.W.2d 51, 53 (1955) ("[A] school district 'is a legislative creation. It is not organized for profit. It is an arm of the state, a part of its political organization. It is not a "person" within the meaning of any bill of rights or constitutional limitation. It has no rights, no functions, no capacity, except such as are conferred upon it by the legislature. . . .' "). Therefore, the equal protection clause of the 14th amendment to the U.S. Constitution and the "special laws" provision of the Nebraska Constitution are not applicable to a school district, which is not a "person" protected by the Constitution, state or federal. Those constitutional guarantees providing equal protection and prohibiting special legislation contemplate an entity having existence independent of a legislature's largess.

Kentsmith ostensibly asserts a claim on behalf of school district No. 46, alleging constitutional considerations of equal protection and special legislation, and thereby acts as a surrogate or alter ego for the school district, seeking redress for school district No. 46. Generally, one cannot assert the constitutional rights of another. See *Blackledge v. Richards*, 194 Neb. 188, 231 N.W.2d 319 (1975). Ordinarily, a challenge to constitutionality of a statute on the ground that the assailed statute denies equal rights and privileges by discriminating between persons or classes may not be made by one not belonging to the class alleged to be discriminated against. See *Griffin v. Gass*, 133 Neb. 56, 274 N.W. 193 (1937). See, also, *Ritums v. Howell*, 190 Neb. 503, 209 N.W.2d 160 (1973) (one who is not harmfully affected by a particular feature of a statute, alleged to be unconstitutional, may not urge the unconstitutionality of the statute in question). As this court announced in *State ex rel. Nelson v. Butler*, 145 Neb. 638, 651, 17 N.W.2d 683, 691-92 (1945):

> It is firmly established as the universal rule that a person "may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his

> disadvantage; and to raise the question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right, and, of course, it is prerequisite that he establish in himself the claimed right which is alleged to be infringed."

If a school district is not a person with constitutional stature to assert certain rights under the Constitutions, Kentsmith, as a protagonist for the school district, cannot by litigation enhance the school district's stature and produce rights for the district greater than those existing in the constitutional realities of the situation before us.

Consequently, in situations such as the present and as the result of a school district's existence as a municipal corporation and subdivision of the state, neither school district No. 46 nor Kentsmith on behalf of that school district has the capacity to raise constitutional questions concerning equal protection and special legislation. In approving a school district's amorphous existence in relation to equal protection and special legislation, today's decision introduces forensic fog into already clouded cases concerning a school district's capacity to raise constitutional questions.

VALERIE A. PETERSON, APPELLEE, V. RAYMOND D. PETERSON, APPELLANT, NORDON WOOLLEN AND MARY ANN WOOLLEN, HUSBAND AND WIFE, INTERVENORS-APPELLEES.

399 N.W.2d 792

Filed January 23, 1987. No. 85-777.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the sound discretion of the trial court. On appeal the judgment of the trial court will be affirmed in the absence of a clear abuse of discretion.
2. **Child Custody.** Where the custody of a minor child is involved, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by

the relationship or has forfeited that right.

3. **Child Custody: Courts.** As authorized by Neb. Rev. Stat. § 42-364 (Reissue 1984), a district court may maintain legal custody while awarding physical custody to a parent or other party. Section 42-364 authorizes the court to place the custody of a minor child in the court, to determine custody on the basis of the best interests of the child, and to make subsequent changes when required. When the best interests of a child, in regard to custody, are not clear, the court may, and should, place custody in the court.

Appeal from the District Court for Phelps County: BERNARD SPRAGUE, Judge. Reversed and remanded with direction.

Greg C. Harris, for appellant.

Marmion F. Yeagley of State, Yeagley & George, for intervenors-appellees.

No appearance for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

In October 1984 Valerie A. Peterson filed for a dissolution of her marriage with Raymond D. Peterson and prayed that the court award her custody of the couple's 6-year-old son, Brooke. Raymond Peterson, as the respondent and cross-petitioner, alleged that Valerie was unfit to have custody of Brooke due to her mental illness and asked for custody of Brooke. The child's maternal grandparents, Nordon and Mary Ann Woollen, who had physical custody of Brooke, intervened in the proceedings without objection, alleged that Raymond Peterson was unfit for custody of Brooke, and asked that custody of Brooke be placed with the grandparents.

Trial was held on August 5, 1985, and evidence was presented to the district court on the fitness of the parties for custody of the minor child, Brooke.

Evidence presented by the wife, Valerie Peterson, described the physical violence inflicted on her by her husband, Raymond. At least once a week Raymond would clench his fists and beat Valerie about her face and head, leaving bruises and causing bleeding. Such physical abuse was corroborated by a member of the wife's church. Also, Mary Ann Woollen, the

wife's mother, testified that on several occasions during the marriage she observed Valerie Peterson's bruised face, swollen nose, and black eyes. Valerie Peterson testified that physical abuse was caused by Raymond Peterson's drinking problem.

Raymond Peterson admitted that he had been convicted of drunk driving in Colorado approximately 1 year prior to the dissolution proceedings. However, he denied that he had any drinking problem. In his testimony, Raymond Peterson admitted that he struck his wife. His reason for striking his wife was her religious practices. As testified by the husband, Valerie Peterson would awaken during the night, claiming to hear voices of people talking to her. Almost every day the wife would pray in the closet with the door closed and lights off, and anointed Brooke and herself with olive oil. Valerie Peterson would also write religious sayings in crayon on the walls of the couple's house.

There was evidence that Valerie suffered from a form of schizophrenia which required hospitalization in 1980. At the time of trial, Valerie Peterson was taking prescription medication for her mental condition. Raymond Peterson testified that his wife persisted in her religious practices, aforementioned, both when she did not take her prescriptions and notwithstanding the medications.

The grandparents, as intervenors, offered evidence of a therapist specially trained in drug and alcohol abuse counseling. The therapist had interviewed Raymond Peterson as the result of Raymond's Colorado drunk driving conviction. The therapist testified that Raymond Peterson suffered from blackouts, morning trembling, job difficulties including missing work, and marital problems, and was inclined to physically abuse his wife. The therapist further testified that tests indicated that Raymond Peterson was a "serious problem drinker."

Raymond Peterson testified about his work history. Peterson testified that he only worked about half the time during which he and Valerie were married and that his present employment would provide support for Brooke. Raymond Peterson's employment included two jobs, one a well-drilling job which required 50 to 60 hours per week and the other being a

deliveryman for a courier service. The well-drilling job sometimes required that Raymond Peterson work until 8 p.m. The courier job required that Raymond Peterson be away from home from noon on Friday through late morning on Saturday. However, Raymond Peterson testified that he could make arrangements with a child care facility and certain relatives for the care of Brooke when Raymond Peterson was not at home.

Evidence on behalf of the grandparents, Nordon and Mary Ann Woollen, indicated that Brooke had spent a substantial amount of time with his grandparents on their farm near Wilcox, Nebraska. Brooke had lived with his grandparents for 6 months during his mother's illness and hospitalization in 1980. At the time of the dissolution proceedings, Valerie Peterson and Brooke had been living with the Woollens since June of 1984, when Raymond Peterson left to work in Colorado. Mary Ann Woollen estimated that Brooke had spent approximately 2 of his 6 years with his grandparents. Mary Ann Woollen also testified that the Woollens have provided support for Raymond, Valerie, and Brooke by paying grocery, clothing, medical, and utility bills over a period of time from February 1979 to April 1983.

Further testimony offered by the Woollens showed that Nordon, age 58, and Mary Ann, age 52, were in good health and financially able to provide for Brooke. Nordon Woollen testified that he takes Brooke with him to check livestock and to do the irrigating, and also plays ball with Brooke. The entire family, including Brooke and his mother, attend church regularly. During the school year preceding the dissolution proceedings, Brooke had been enrolled in kindergarten in the Wilcox public schools and had done well academically, according to the testimony of Mary Ann Woollen, who had attended parent-teacher conferences for Brooke. Mary Ann Woollen also testified that she takes care of Brooke, bathes him, plays with him, does his laundry, sees to it that he gets to school, makes certain Valerie takes her medication, and never leaves Brooke alone with Valerie.

To prove that it was in Brooke's best interests to be in the custody of his grandparents, the Woollens offered the testimony of two experts. Dr. Charles Eigenberg conducted a

family evaluation of the Woollens, Valerie, and Brooke approximately 1 month prior to the dissolution proceedings. Dr. Eigenberg observed a "very good solid attachment" between Brooke and his grandparents, and further noted that Brooke "[s]eemed to be well adjusted" to the living situation involving his grandparents. Upon further evaluation and testing, Dr. Eigenberg concluded that in his opinion it would be detrimental to Brooke to break the bond with the Woollens, as Brooke views the Woollens as parents rather than grandparents. Dr. Eigenberg also expressed his opinion in regard to the danger of Valerie's being in the same home with Brooke, and concluded that he foresaw no risk of harm as long as the medication is controlled and adequately supervised. Dr. Eigenberg concluded it would be in Brooke's best interests to stay with his grandparents. Dr. Gerald Daly, a psychologist, generally agreed with Dr. Eigenberg. Dr. Daly had interviewed Brooke, his mother, and his grandparents. Based upon this interview, Dr. Daly expressed his opinion that Mary Ann Woollen has become Brooke's primary caregiver, in that she is the person Brooke turns to for comfort and depends on in stressful situations.

In response to the evidence proffered by the Woollens, Raymond offered the testimony of Dr. Ernest Matuschka, a clinical psychologist, whose practice includes family therapy and the treatment and rehabilitation of alcoholics. Dr. Matuschka testified that, in his opinion, Brooke could not be safe at home with Valerie for the reason that many schizophrenics outside the hospital setting do not stay on medication, as the disease affects their thought processes, and that even while on medication they may be dangerous to others. In regard to Raymond Peterson's drinking problem, Dr. Matuschka defined Raymond Peterson as a "reactive problem drinker" since age 16. Dr. Matuschka described this type of problem drinking as stress-induced and one that can occur again and, thus, would require professional help for Raymond Peterson. Although Dr. Matuschka noted that returning Brooke to his father would not be detrimental to the child, he felt Brooke's return to his father would be disruptive until Brooke made the readjustment. On cross-examination Dr. Matuschka admitted his opinions were based only on his

discussions with Raymond and Brooke and not on any personal evaluation of Valerie or the Woollens. Further, Dr. Matuschka admitted that Raymond's work schedule made him "hard pressed time-wise" to meet his obligations to Brooke. Finally, Dr. Matuschka admitted that Brooke, during the interview, had indicated a preference for staying with his grandparents.

Upon completion of the evidence, the district court stated, in a "decree of dissolution of marriage" entered September 4, 1985:

> [N]either the petitioner, Valerie A. Peterson, nor the respondent, Raymond D. Peterson, are [sic] fit and suitable parents to have custody of the minor child at this time and that it is in the best interests of the child that custody of the child be awarded to Nordon Woollen and Mary Ann Woollen, intervenors . . . .

On September 4 the court also entered another order, as follows:

> [A] follow-up examination of the child, Brooke Ian Peterson, should be performed by Dr. Ernest Matuschka and Dr. Gerald Daly in March of 1986 to determine the emotional state and condition of the child at that time. The parties should notify the psychologists of the contents of this Order and arrange for each psychologist to prepare such a report in March of 1986. Each psychologist should prepare a report and submit the original to Judge Bernard Sprague with a copy of each report to counsel of record.
>
> IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED BY THE COURT that a follow-up examination of the child, Brooke Ian Peterson, should be performed by Dr. Ernest Matuschka and Dr. Gerald Daly in March of 1986 and the reports should be furnished to the Court with copies to counsel of record.

Raymond Peterson has appealed from the judgment of the district court and alleges the district court erred in finding that the respondent was unfit to serve as custodial parent and in finding that the best interests of Brooke require the placement of the child with the Woollens. Valerie Peterson has not appealed.

Although our review of the judgment is de novo on the

> record, child custody determinations are matters initially entrusted to the sound discretion of the trial court. On appeal the judgment of the trial court will be affirmed in the absence of a clear abuse of discretion. *Clark v. Clark*, 220 Neb. 771, 371 N.W.2d 749 (1985). We also "give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other." *Id.* at 777, 371 N.W.2d at 754.

Ainsworth v. Ainsworth, ante p. 160, 161, 396 N.W.2d 285, 286 (1986). See, also, *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986).

Neb. Rev. Stat. § 42-364 (Reissue 1984) provides:

> When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in the custody of the court or third parties . . . . Custody . . . of minor children shall be determined on the basis of their best interests.

However, when the controversy as to custody is between the natural parent and other relatives or strangers, the guiding principles are:

> Where the custody of a minor child is involved . . . , the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.
>
> The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.
>
> The right of a parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he is shown to be unfit or to have forfeited his superior right to such custody.

Nielsen v. Nielsen, 207 Neb. 141, 149, 296 N.W.2d 483, 488 (1980).

On our review of the record, we find that the district court did not abuse its discretion in determining that Raymond

Peterson was unfit to be the custodial parent of Brooke. The evidence presented relating to Raymond's continuing drinking problem, his failure to support his wife and Brooke during the marriage, and the unsuitable parenting schedule he intends to maintain supports the decision of the district court that Raymond is not fit to be a custodial parent. See *Ainsworth v. Ainsworth, supra.*

An abundance of evidence was offered to show the positive adjustment Brooke has made to living with his grandparents, including evidence which indicated that he preferred to maintain that living arrangement. See *State ex rel. Sanders v. Doyle*, 187 Neb. 453, 191 N.W.2d 545 (1971). The relative age of the Woollens, their financial stability, and the positive involvement with Brooke indicate that the Woollens may be suitable persons to have physical custody of Brooke Peterson.

However, we are concerned about the living arrangement at the home of Nordon and Mary Ann Woollen involving the presence of Valerie Peterson in that arrangement. Evidence indicates that there remains some danger to Brooke should he be left unattended with Valerie while in the custody of the Woollens. In apparent recognition of this problem, the district court ordered followup examinations in March of 1986 by Drs. Matuschka and Daly to determine Brooke's emotional status and to report their findings to the court. The results of the followup examinations, if such examinations have taken place, are not a part of the record before us.

We agree with the precaution taken by the district court in seeking additional information about Brooke, but this raises a question as to whether or not the district court should have retained legal custody of Brooke under the circumstances. It is clear that a district court may maintain legal custody while awarding physical custody to a parent or other party. See § 42-364. See, also, *Swearingen v. Swearingen*, 201 Neb. 255, 267 N.W.2d 514 (1978); *Mason v. Mason*, 200 Neb. 476, 263 N.W.2d 865 (1978). As we stated in *Bartlett v. Bartlett*, 193 Neb. 76, 78-79, 225 N.W.2d 413, 415 (1975):

> Section 42-364, R.R.S. 1943, authorizes the court to place the custody of minor children in the court, to determine custody on the basis of the best interests of the

> children, and to make subsequent changes when required. When the best interests of the children, in regard to custody, is not clear, the court may, and should, place custody in the court. In regard to such disposition we have stated that: "Its purpose is to 'facilitate judicial supervision and summary power to act swiftly in their [the children's] best interests.' * * * The parent having possession where the court has retained custody is in effect an agent of the court." Benson v. Benson, 190 Neb. 87, 206 N.W.2d 51.

See, also, *Berry v. Berry,* 202 Neb. 540, 276 N.W.2d 200 (1979). Further, we have admonished that "[t]he interests of minor children should be safeguarded even to the extent of taking precautions which may prove to be unnecessary." *Bralick v. Bralick,* 194 Neb. 183, 184, 231 N.W.2d 129, 131 (1975).

We find that the district court abused its discretion by placing legal custody of Brooke Peterson with the Woollens. The district court should have retained legal custody for the purpose of protecting Brooke's best interests and ensuring that he would be protected from any adverse behavior of his mother, i.e., by eliminating the possibility that he would ever be left alone with Valerie Peterson as long as her condition remains as it has been in the past. We do not feel that the information in the record is current enough to enter an order regarding physical location or physical custody of the child. The district court has also indicated some concern in view of the supplemental reports to be made by the psychologists and a reevaluation concerning the child's well-being 6 months after the trial in the dissolution proceedings. For this reason, we reverse the judgment of the district court and remand these proceedings to the district court with direction that the legal custody of Brooke Peterson be placed in the district court and that further evidence, if such evidence has not already been received, be provided to the district court, bearing upon the placement of physical custody in the best interests of Brooke Peterson.

REVERSED AND REMANDED WITH DIRECTION.

COUNTY OF LANCASTER, NEBRASKA, APPELLEE, V. DANIEL L. MASER ET AL., APPELLEES, DEPARTMENT OF BANKING AND FINANCE OF THE STATE OF NEBRASKA, RECEIVER FOR COMMONWEALTH SAVINGS COMPANY, APPELLANT. COUNTY OF LANCASTER, NEBRASKA, APPELLEE, V. MICHAEL A. MENCK ET AL., APPELLEES, DEPARTMENT OF BANKING AND FINANCE OF THE STATE OF NEBRASKA, RECEIVER FOR COMMONWEALTH SAVINGS COMPANY, APPELLANT. COUNTY OF LANCASTER, NEBRASKA, APPELLEE, V. COMMONWEALTH SAVINGS COMPANY ET AL., APPELLEES, TABITHA DEVELOPMENT CORPORATION, A NEBRASKA CORPORATION, ET AL., APPELLANTS.

400 N.W.2d 238

Filed January 23, 1987. Nos. 85-890, 85-916, 85-917.

1. **Statutes: Legislature.** One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent.
2. _____: _____. When statutory language is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of the lawmakers.
3. **Statutes: Legislature: Appeal and Error.** In determining the intent of the Legislature, the Supreme Court considers the history of the legislation and the reasonableness of an interpretation, weighed against an unreasonable or absurd construction evidently not intended by the Legislature.
4. **Statutes: Legislature.** Legislative history includes the record of a floor explanation or debate, which is an extrinsic, secondary source in statutory interpretation.
5. **Foreclosure: Liens: Tax Sale: Redemption: Time.** The time for redemption, as such phrase is used in Neb. Rev. Stat. § 77-1902 (Reissue 1986), is the 3 years immediately following a delinquent tax sale. An action to foreclose a tax lien pursuant to § 77-1902 can only be brought within the 90 days immediately after expiration of the time for redemption.
6. **Case Overruled.** *Bish v. Fletcher*, 219 Neb. 863, 366 N.W.2d 778 (1985), is overruled.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with direction.

D.C. Pierson of Pierson, Ackerman, Fitchett, Akin & Hunzeker, for appellant Department of Banking and Finance.

Douglas D. Cyr, Deputy Lancaster County Attorney, for appellee County of Lancaster.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

The Department of Banking and Finance of the State of Nebraska, Receiver for Commonwealth Savings Company; Tabitha Development Corporation, a Nebraska corporation; Tabitha Village, Inc., a Nebraska corporation; Tabitha Home, a Nebraska corporation; and Autumn Wood Venture, a Nebraska corporation, as owners of real estate in Lancaster County, Nebraska, have appealed the decree foreclosing real estate tax liens of Lancaster County in consolidated actions involving tax sale certificates purchased by the county and foreclosure of tax liens represented by those certificates.

A review of applicable statutes will assist understanding the positions taken by the parties.

Neb. Rev. Stat. § 77-1824 (Reissue 1986) states in part: "The owner or occupant of any land sold for taxes or any person having a lien thereupon or interest therein, may redeem the same at any time before the delivery of tax deed by the county treasurer . . . ."

Neb. Rev. Stat. § 77-1837 (Reissue 1986) states in part:

> (1) Except as provided in subsection (2) of this section, at any time within ninety days after the expiration of three years from the date of sale of any real estate for taxes or special assessments, if the same shall not have been redeemed, the county treasurer, on request, and on production of the certificate of purchase, and upon compliance with the provisions of sections 77-1801 to 77-1837, shall execute and deliver to the purchaser, his heirs or assigns, a deed of conveyance for the real estate described in such certificate.

Neb. Rev. Stat. § 77-1902 (Reissue 1986) in pertinent part provides:

> (1) Where land has been sold for delinquent taxes and a tax sale certificate or tax deed has been issued, the holder of such tax sale certificate or tax deed may, instead of

> demanding a deed or, if a deed shall have been issued, by surrendering the same in court, proceed in the district court of the county in which the land is situated to foreclose the lien for taxes represented by the tax sale certificate or tax deed, and all subsequent tax liens thereon, in the same manner and with like effect as in the foreclosure of a real estate mortgage, except as otherwise specifically provided by sections 77-1903 to 77-1917. Except as provided in subsection (2) of this section, *such action shall only be brought within ninety days after the expiration of the time for redemption from the tax sale upon which the tax sale certificate or tax deed is based.*

(Emphasis supplied.) Neb. Rev. Stat. § 77-1917 (Reissue 1986) in part recites: "Any person, entitled to redeem any lot or parcel of land, may do so at any time after the decree of foreclosure and before the final confirmation of the sale . . . ."

Last, but certainly not least, is Neb. Const. art. VIII, § 3, pertaining to the right of redemption:

> The right of redemption from all sales of real estate, for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof. Provided, that occupants shall in all cases be served with personal notice before the time of redemption expires.

Since certain real estate taxes and assessments for prior years were unpaid, on August 22, 1980, Lancaster County issued and purchased tax sale certificates for such unpaid levies, see Neb. Rev. Stat. § 77-1809 (Reissue 1986) (delinquent tax sales; purchase by county), which certificates matured on August 23, 1983, entitling Lancaster County to a treasurer's tax deed on real estate which had not been redeemed. See § 77-1837. In the present case, the owners' real estate was not redeemed. On November 22 and November 23, 1983, that is, 91 and 92 days after its tax sale certificates had matured, Lancaster County commenced actions to foreclose those certificates pursuant to § 77-1902(1).

The owners responded that the county's actions were barred by the 90-day limit prescribed by § 77-1902(1). On October 8,

1985, the district court found that Lancaster County had timely commenced its actions, and subsequently entered a decree foreclosing the tax liens of the tax sale certificates. In ruling that Lancaster County had timely filed its petitions, the district court apparently relied upon *Bish v. Fletcher*, 219 Neb. 863, 366 N.W.2d 778 (1985), which was issued approximately 6 months before the district court's decree of foreclosure.

In this appeal, the sole issue is whether the county filed its foreclosure actions within the time specified in § 77-1902(1). We are not concerned here with the county's tax lien, which continues until that lien has been divested by payment of taxes or sale of real estate in foreclosure of such lien as authorized in Neb. Rev. Stat. § 77-1901 (Reissue 1986). See *County of Valley v. Milford*, 70 Neb. 313, 97 N.W. 310 (1903).

The real estate owners contend that the "time for redemption" expressed in § 77-1902(1) expires when a tax sale certificate matures 3 years after the tax sale. Thus, the owners argue that the tax sale certificates in the present cases matured on August 23, 1983, and that the county's petitions for foreclosure, which were filed more than 90 days after expiration of the time for redemption, were not filed within the time limits specified in § 77-1902(1).

All parties in the present proceedings pointedly criticize *Bish v. Fletcher, supra*, where, similar to the present case, the appellees held a tax sale certificate which matured on August 23, 1983. Rather than demanding a tax deed, the appellees in *Bish* filed a petition to foreclose the lien of their tax sale certificate in the district court on February 3, 1984, pursuant to § 77-1902. In holding that the petition, which was filed 164 days after the tax sale certificate had matured, was timely filed, we stated:

> [A] holder of a tax certificate may request a deed at any time after 3 years from the date of sale and up until 90 days thereafter, and because § 77-1824 allows the owner to redeem at any time before delivery of a tax deed, it would be possible for the period of redemption to cover at least 3 years and 90 days. The time for redemption would finally expire in this case on November 21, 1983. The action to foreclose had to be brought within 90 days of that date,

which it was.

219 Neb. at 865, 366 N.W.2d at 780. In *Bish* we held that the "time for redemption" from a tax sale was 3 years and 90 days and that a petition to foreclose the lien of a tax sale certificate may be brought within 90 days after expiration of the "3 years and 90 days" period. Thus, in *Bish* this court equated "time for redemption" (§ 77-1902) with the "right of redemption" (§§ 77-1824 and 77-1917).

The focal point of this case is a characterization or illustration of the phrase "time for redemption" found in § 77-1902(1).

Guided by the language "for a period of not less than two years" found in Neb. Const. art. VIII, § 3, this court long recognized 2 years as the period of time for redemption in reference to tax sales. For example, in *McGavock v. Pollack*, 13 Neb. 535, 536, 14 N.W. 659 (1882), this court examined statutes which provided: " 'The owner or occupant of any lands sold for taxes . . . may redeem the same at any time within two years after the day of sale,' " and " 'If no person shall redeem such lands within 2 years, at any time after the expiration thereof [a treasurer's deed may be delivered to the purchaser].' " (Emphasis omitted.) In construing the foregoing statutes, this court, in *McGavock*, declared void a tax deed issued 1 day before expiration of the 2-year time for redemption and stated at 536, 14 N.W. at 659: "[T]he owner of land sold for taxes, or other interested person, shall have two full years 'after the day of such sale' within which to redeem it." (Emphasis omitted.)

Parker v. Matheson, 21 Neb. 546, 32 N.W. 598 (1887), involved a petition filed on February 21, 1885, to foreclose a lien based on a tax sale certificate purchased on February 5, 1878. *Parker* involved a statute providing a 2-year period for redemption and a 5-year limitation for foreclosure of a tax sale lien. Deciding that the foreclosure action was barred because the proceedings were not commenced within the statutory time, this court expressed in *Parker*:

> The action to foreclose could not have been brought until the time given to redeem had expired. . . . The sale was simply void and conferred a lien for the taxes which might be foreclosed after the expiration of the time in which the

> defendant might redeem. That time was two years from date of sale. February 6th, 1880, the action could have been maintained. The suit was instituted February 21st, 1885, five years and fifteen days after the expiration of the time for redemption.

21 Neb. at 547, 32 N.W. at 598. In *County of Valley v. Milford*, 70 Neb. 313, 316, 97 N.W. 310, 311 (1903), which also involved a 5-year statute of limitations for foreclosure of a lien acquired through a tax sale certificate, we stated:

> In view of the constitutional provision which provides that the tax debtor may redeem from the tax sale at any time within two years, and in view of other provisions of the statute, this court has repeatedly held that the five years, within which foreclosure proceedings might be brought, did not commence to run until the expiration of the two years within which the tax debtor might redeem from the sale.

An analysis of the time allowed for redemption from a tax sale and lien is found in *Connely v. Hesselberth*, 132 Neb. 886, 889, 273 N.W. 821, 823 (1937):

> Where there has been a valid administrative sale by the county treasurer to a private individual and he has not brought foreclosure action until more than two years after the issuance of the tax sale certificate, the owner, or other person interested, is not entitled to two years in which to redeem from the confirmation of sale under decree of foreclosure. He is entitled to only one two-year period, and that has been given from the time of the administrative sale and before the commencement of the foreclosure action. It is true, however, that in such case he is entitled to an additional period in which to redeem; that is, at any time prior to the confirmation of the sale. The correct rule is that owners and others interested in realty, sold under decree foreclosing valid tax sale certificate, where foreclosure was commenced more than two years subsequent to issuance of tax sale certificate, are barred from the right of redemption on confirmation of such judicial sale.

See, also, *Peterson v. Swanson*, 133 Neb. 164, 274 N.W. 482

(1937); *County of Madison v. Walz*, 144 Neb. 677, 14 N.W.2d 319 (1944); *County of Lincoln v. Provident Loan & Investment Co.*, 147 Neb. 169, 22 N.W.2d 609 (1946). In *Connely*, this court recognized the very important distinction between the "time for redemption," which was the constitutional right of redemption for 2 years from the date of the tax sale, and the statutory right of redemption which existed thereafter until confirmation of a judicial sale of the property. In *Bish v. Fletcher*, 219 Neb. 863, 366 N.W.2d 778 (1985), we overlooked such distinction between "time for redemption" and "right of redemption." Also, the 2-year "time for redemption" was statutorily expressed in § 77-1837 (Reissue 1971): "At any time within three years after the expiration of two years from the date of sale of any real estate for taxes or special assessments," making it clear that, after expiration of the 2 years for redemption, a purchaser of a tax sale certificate had 3 years to obtain a treasurer's tax deed. By virtue of §§ 77-1824 and 77-1917 (Reissue 1971), the right of redemption continued, however, until either a treasurer's tax deed was issued or there was judicial confirmation of a sheriff's sale in foreclosure of the lien for delinquent taxes.

In 1975, the Nebraska Legislature passed L.B. 78, which amended § 77-1837, expanding the time for redemption to 3 years and decreasing the time for commencement of a tax lien foreclosure or acquisition of a treasurer's tax deed, namely, a decrease from 3 years to 90 days after expiration of the time for redemption.

Returning to *Bish v. Fletcher, supra*, we concluded that since a *right* of redemption existed anytime until the issuance of a tax deed (§ 77-1824 (Reissue 1986)), the *time* for redemption (§ 77-1902(1) (Reissue 1986)) coexisted for the same duration. However, the ultimate extension of the *Bish* rule—"time for redemption" and "right of redemption" exist for the same duration—ironically produces a peculiar result. Under § 77-1902, a tax foreclosure cannot be commenced until the time for redemption has expired. Yet, under § 77-1917 (Reissue 1986), a right of redemption exists in a tax foreclosure until the sale in the foreclosure proceeding is confirmed, concluding the foreclosure and extinguishing the right of redemption.

According to *Bish*, the time for redemption and the right of redemption endure for the same period, that is, until confirmation of a tax foreclosure sale. But a tax foreclosure proceeding cannot be commenced before expiration of the time for redemption (§ 77-1902), that is, according to *Bish*, until a tax foreclosure sale has been confirmed. Therefore, as a result of *Bish*, a tax foreclosure proceeding cannot be commenced until such foreclosure proceeding has been concluded by confirmation. We do not believe such a catch-22 was intended as a part of the statutory scheme pertaining to tax foreclosure sales.

"One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent." *Spence v. Terry*, 215 Neb. 810, 814, 340 N.W.2d 884, 886 (1983). "When statutory language is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of the lawmakers." *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 121, 362 N.W.2d 35, 40 (1985). See, also, *Worley v. City of Omaha*, 217 Neb. 77, 348 N.W.2d 123 (1984). In determining the intent of the Legislature, the Supreme Court considers the history of the legislation and the reasonableness of an interpretation, weighed against an unreasonable or absurd construction evidently not intended by the Legislature. *Otto v. Hahn*, 209 Neb. 114, 306 N.W.2d 587 (1981). See, also, *Johnson v. School Dist. of Wakefield*, 181 Neb. 372, 148 N.W.2d 592 (1967). "Legislative history includes the record of a floor explanation or debate, which is an extrinsic, secondary source in statutory interpretation." *Spence v. Terry, supra* at 815, 340 N.W.2d at 887.

A review of the legislative history of L.B. 78, which amended § 77-1902 in 1975, discloses that the bill's introducer stated during floor debate:

> [W]e have spelled this out plainly what our intent was in three years to bring this back for a tax sale. . . . [T]his is quite plain now and it does bring it down to three years and then they have to move on it in 90 days after that three year period.

Floor Debate, L.B. 78, 84th Leg., 1st Sess. 1592 (Mar. 19,

1975). The Legislature intended that a tax foreclosure under § 77-1902 can only be brought within the 90 days immediately after expiration of 3 years from the tax sale on which a tax sale certificate or tax deed is based.

We now hold that the "time for redemption," as such phrase is used in § 77-1902, is the 3 years immediately following a delinquent tax sale and that an action to foreclose a tax lien pursuant to § 77-1902 can only be brought within the 90 days immediately after expiration of such time for redemption. Consequently, *Bish v. Fletcher*, 219 Neb. 863, 366 N.W.2d 778 (1985), stating that the "time for redemption" is 3 years and 90 days from the date of a tax sale, is overruled.

We must, therefore, reverse the judgment of the district court and remand this matter with direction to dismiss the actions of Lancaster County because the county's petitions were not filed within the time prescribed by § 77-1902.

REVERSED AND REMANDED WITH DIRECTION.

CHARLES O'KEEFE, APPELLANT, V. TABITHA, INC., AND RONALD E. SORENSEN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEES.

399 N.W.2d 798

Filed January 23, 1987. No. 86-071.

1. **Employment Security Law: Appeal and Error.** In an appeal regarding disqualification of benefits under Neb. Rev. Stat. § 48-628(b) (Reissue 1984), the Supreme Court retries factual questions de novo on the record and reaches conclusions independent of those reached by the district court.
2. **Employment Security Law.** While absences due to illness may not constitute an employee's misconduct, an employee's chronic and excessive absenteeism demonstrates a wanton and willful disregard of the employer's interests for the purpose of Neb. Rev. Stat. § 48-628(b) (Reissue 1984).
3. **Employment Security Law: Labor and Labor Relations.** A labor contract is irrelevant to the determination of the existence of misconduct, because,

generally, private labor agreements may not render an unemployment compensation law ineffectual.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Noel S. DeKalb, for appellant.

Jerry L. Pigsley of Nelson & Harding, for appellee Tabitha, Inc.

Laureen Van Norman, for appellee Sorensen.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Charles O'Keefe appeals the judgment of the district court for Lancaster County, affirming the decision of the Nebraska Appeal Tribunal which had determined that, on account of misconduct as an employee of Tabitha, Inc., O'Keefe was disqualified from unemployment benefits for a period of 9 weeks, according to Neb. Rev. Stat. § 48-628 (Reissue 1984), which provides:

> An individual shall be disqualified for benefits:
>
> . . . .
>
> (b) For the week in which he or she has been discharged for misconduct connected with his or her work, if so found by the commissioner, and for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner in each case according to the seriousness of the misconduct; *Provided,* that if the commissioner finds that such individual's misconduct was gross, flagrant, and willful, or was unlawful, the commissioner shall totally disqualify such individual from receiving benefits with respect to wage credits earned prior to such misconduct.

Tabitha operates a nursing home, supplying services to as many as 236 dependent residents of the home. Since 1983, Tabitha has employed O'Keefe in dietary services and, in September of 1984, adopted a written "no fault attendance policy" which was distributed to its employees. Under such

policy, an employee's absence from work, regardless of cause, was charged against the total number of absences which constituted a basis for terminating employment at Tabitha. According to the Tabitha policy adopted in 1984, two absences within a 2-month period resulted in a first notice to an employee; four absences within 6 months, a second notice; and six absences within 10 months, a third and final notice. Six absences within a 12-month period were a cause for Tabitha's dismissal of an employee.

Before adoption of the written policy in 1984, O'Keefe was sick and absent from employment 4 days in January of 1984, 2 days in February, 2 days in March, 3 in April, 2 in May, 2 in July, and 6 in August. On January 21, 1984, some unidentified person called Tabitha on behalf of O'Keefe and reported that O'Keefe would not report for work. On May 30, O'Keefe called in and stated he would not report for work, since he was working on his automobile. O'Keefe failed to call in or show up for work on August 19. After adoption of the written policy and between September 1, 1984, and February 22, 1985, O'Keefe missed 15 days on account of sickness and missed an additional 3 nonconsecutive days for reasons other than illness. On March 4, 1985, O'Keefe called in after a shift had commenced and informed his supervisor that he was unable to report for work. O'Keefe had been warned about his absences and was dismissed from employment on March 5.

In an appeal regarding disqualification of benefits under § 48-628(b), the Supreme Court retries factual questions de novo on the record and reaches conclusions independent of those reached by the district court. See, *Heimsoth v. Kellwood Co.*, 211 Neb. 167, 318 N.W.2d 1 (1982); *McClemens v. United Parcel Serv.*, 218 Neb. 689, 358 N.W.2d 748 (1984); *Smith v. Sorensen*, 222 Neb. 599, 386 N.W.2d 5 (1986).

For his first assignment of error, O'Keefe argues that the evidence does not sustain a disqualification from benefits under § 48-628(b).

As this court expressed in *McCorison v. City of Lincoln*, 215 Neb. 474, 475-78, 339 N.W.2d 294, 295-96 (1983):

> We have previously defined misconduct as referred to in § 48-628(b). Specifically, in *Stuart v. Omaha Porkers*, 213

Neb. 838, 840, 331 N.W.2d 544, 546 (1983), we recently said: "While the term 'misconduct' is not specifically defined in the statute, it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations." [Citations omitted.]

. . . .

An employer has a right to expect an employee to be on the job except when otherwise excused and as authorized by the employment rules. The City, through its personnel code, provided for certain authorized times to be absent from work, including sick leave with pay, funeral leave with pay, and injury leave with pay. However, the absences, as reflected by the record, were neither explained nor justified by McCorison.

In an extensive annotation found at 41 A.L.R.2d 1158, 1160 (1955), the author notes: "Under statutes providing that unemployment benefits are to be denied or delayed to one whose unemployment results from discharge for wilful misconduct, it has been held or recognized that persistent or chronic absenteeism, at least where the absences are without notice or excuse, and are continued in the face of warnings by the employer, constitutes wilful misconduct within the statute." In *Keefer v. Com., Unemployment Comp. Bd. of Rev.*, 47 Pa. Commw. 281, 407 A.2d 934, 935 (1979), the Pennsylvania Commonwealth Court said: "However, excessive unjustified absenteeism can constitute willful misconduct because it may evidence a wanton and willful disregard of the employer's interest or a disregard of the standards of behavior which an employer can rightfully expect from his employee."

. . . .

"No aspect of contract of employment is more basic

> than the right of the employer to expect employees will appear for work on the day and at the hour agreed upon. Persistent failure to honor that obligation evinces a substantial disregard for the employer's interest and may justify a finding of misconduct connected with the employment.
>
> "Ample authority may be found in other jursidictions to the effect that persistent or chronic absenteeism without notice or excuse in the face of warnings from the employer constitutes such misconduct as requires a denial of unemployment compensation. [Citations omitted.]" [Citing *Wallace v. Stewart*, 559 S.W.2d 647 (Tenn. 1977).]

Also, as observed by this court in *Stuart v. Omaha Porkers*, 213 Neb. 838, 840, 331 N.W.2d 544, 546 (1983):

> In common experience, the presence of or at least the preshift notice of absence of a workman is essential to the efficient operation of an assembly line production system and is a legitimate interest of the employer. The absence without notice, taken with previous warning, was sufficient to find that Stuart was discharged for willful misconduct.

See, also, *Strauss v. Square D Co.*, 201 Neb. 571, 270 N.W.2d 917 (1978).

In the case before us, Tabitha had an understandably strict schedule to maintain in view of the services to be provided to residents of a nursing home. While absences due to illness may not constitute an employee's misconduct, we conclude that an employee's chronic and excessive absenteeism demonstrates a wanton and willful disregard of the employer's interests for the purpose of § 48-628(b). See *McCorison v. City of Lincoln, supra*.

As a second assignment of error, O'Keefe contends that Tabitha violated its written policy regarding warnings to be given to its employees before termination of employment. In this regard O'Keefe relies upon *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983). *Morris* involved an employee's suit on an employment contract and the necessity of pleading and proving a deviation from the employer's "policies and procedures" which were incorporated into the

contract of employment. In this case, however, O'Keefe has not brought suit to enforce whatever may be his rights under his employment contract with Tabitha. O'Keefe has brought the action to collect unemployment benefits authorized by statute. *Smith v. Sorensen*, 222 Neb. 599, 386 N.W.2d 5 (1986), contains the rule applicable for disposing of O'Keefe's second assignment of error. *Smith v. Sorensen* teaches that a "labor contract is irrelevant to the determination of the existence of misconduct, as it appears that, generally, private labor agreements may not render an unemployment compensation law ineffectual." *Id.* at 605, 386 N.W.2d at 9. See, also, *Strauss v. Square D Co., supra.*

As his third and final assignment of error, O'Keefe claims it was improper to consider his work record as such existed before Tabitha adopted its written attendance policy in September 1984. We disagree. Under the circumstances, we find it is proper to consider an employee's work history as a course of conduct and behavior which may constitute "misconduct" necessary for disqualification from unemployment compensation. See *Roll v. City of Middleton*, 105 Idaho 22, 665 P.2d 721 (1983).

Upon our de novo review of the record in this case, we find misconduct within the meaning of § 48-628(b) has disqualified O'Keefe from unemployment compensation for a period of 9 weeks, as determined by the district court. We, therefore, affirm the judgment of the district court.

AFFIRMED.

JOANNE HAYES, APPELLEE, V. A.M. COHRON, INC., APPELLANT.
400 N.W.2d 244

Filed January 23, 1987. No. 86-197.

1. **Workers' Compensation: Words and Phrases.** The definition of "accident," as used in Neb. Rev. Stat. § 48-101 (Reissue 1984), includes injuries resulting from activities which create a series of repeated traumas ultimately producing disability.

2. **Workers' Compensation.** Neb. Rev. Stat. § 48-168 (Reissue 1984) provides, among other things, that the compensation court shall not be bound by any technical or formal rules of procedure.
3. **Workers' Compensation: Proof.** A workers' compensation plaintiff has the burden of proving that an injury resulted from an accident arising out of and in the course of employment.
4. _____: _____. If it is claimed that the injury was the result of employment exertion, the evidence must show that the employment contributed to the cause of the injury in some material and substantial degree.
5. _____: _____. The presence of a preexisting condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment.
6. **Expert Witnesses: Words and Phrases.** The meaning of words used by medical experts at times presents a problem of interpretation which may be resolved by the sense in which they were used.
7. **Workers' Compensation: Wages: Employment Contracts.** The wage rate is to be computed according to the contract of hire in force at the time of the accident.

Appeal from the Nebraska Workers' Compensation Court. Affirmed as modified, and cause remanded with direction.

James J. DeMars of Barlow, Johnson, DeMars & Flodman, for appellant.

Robert R. Moodie of Friedman Law Offices, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The appellee employee, Joanne Hayes, alleged she sustained personal injury in an accident arising out of and in the course of her employment with the appellant employer, A.M. Cohron, Inc., when she felt a sudden, sharp pain in her knee while "lifting a 200 pound I-beam with a co-worker." The compensation court found Hayes suffered accidental injury to her right leg arising out of and in the course of her employment with Cohron by virtue of being "frequently required to work on her knees," and awarded her certain benefits under the provisions of Neb. Rev. Stat. §§ 48-120 (Reissue 1984) and 48-121 (Cum. Supp. 1986). Cohron appeals and assigns as errors the compensation court's (1) finding that Hayes suffered an injury arising out of and in the course of her employment, (2)

finding the evidence sufficient to support its award, (3) receiving a certain deposition in evidence, and (4) basing Hayes' weekly benefits upon a 45-hour workweek.

Hayes testified she was hired by Cohron to work 45 hours per week as a construction crew general laborer. During the period of her employment, April 17 through June 3, 1985, Hayes performed tasks which required her to kneel 75 percent of the time.

Sometime after Hayes began her work, she experienced pain and swelling in her knees. The condition worsened near the end of May; however, she continued working. She testified that on June 3, 1985, while she and fellow employee Richard Kenney were lifting heavy I-beams, she felt something tear in her right leg. Hayes put the I-beam down, told Kenney she had been injured, and went to locate her foreman. Hayes continued working that day, but at lighter duties.

Hayes sought medical attention from a Lincoln, Nebraska, orthopedic surgeon on the following day. This physician testified that during the first visit Hayes stated she was experiencing pain in both knees, especially in the right one, and that she had experienced this pain for "quite some time at the job she was working on." X rays showed that Hayes had abnormally tilted kneecaps on both sides. It was the physician's diagnosis that Hayes was suffering from a "tendency of the kneecap to dislocate." The physician further stated that the condition is usually present in the teenage years, but symptoms do not occur unless the afflicted person enters the type of activity Hayes had been performing.

The physician initially prescribed a drug for the pain, a knee brace, and physical therapy. Hayes was later given a release on June 18, 1985, to return to work. She then went to work loading trucks for an employer other than Cohron but, because of the pain in her right knee, had to quit after 3 days. Surgery was performed on the right knee on July 24, 1985.

Hayes had not informed the physician of the June 3 I-beam incident until September 4, 1985, after she had filed this suit. In the physician's opinion Hayes' preexisting knee condition had been aggravated, and the aggravation "could have been caused by an accident such as [the June 3 incident] or by the repetitive

kneeling and squatting that she was required to do." The physician further stated that he could not tell "which may have caused it."

Hayes' last visit to the physician occurred on October 15, 1985, at which time he felt Hayes was able to return to light work.

Cohron's first assignment of error, which attacks the finding that Hayes' injury arose out of and in the course of her employment, rests on the fact that, while the compensation court found that the injury resulted from the cumulative trauma attendant to Hayes' frequently working on her knees, Hayes had pled the injury occurred as the result of a specific, single incident, the lifting of a beam. Cohron argues that the compensation court's finding is outside the issues of the case.

Cases exist which have denied a claim for workers' compensation benefits because of a variance between the pleadings and the proof. For example, in *Cearley v. Royal Globe Ins. Co.*, 632 S.W.2d 942 (Tex. App. 1982), the plaintiff's original petition alleged that he had suffered an injury to his respiratory system by excess exposure to gases in the work environment on a specific date. The testimony at trial, however, revealed that plaintiff's breathing problems had developed over a gradual period due to repetitive exposure to the gases in the work environment. The court held that because the evidence showed a disability due to an occupational disease rather than an injury occurring on a specific date as alleged, plaintiff could not recover. However, *Cearley* is inapposite, for the jurisdiction in which it was decided, unlike Nebraska, adheres to the one specific incident "traceable to a definite time and place" theory of "accident." *Id.* at 946. *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982), makes clear that in Nebraska the definition of "accident," as used in Neb. Rev. Stat. § 48-101 (Reissue 1984), includes injuries resulting from activities which create a series of repeated traumas ultimately producing disability. See, also, *Masters v. Iowa Beef Processors*, 220 Neb. 835, 374 N.W.2d 21 (1985); *McLaughlin v. Self-Insurance Servs.*, 219 Neb. 260, 361 N.W.2d 585 (1985); *Tranmer v. Mass Merchandisers*, 218 Neb. 151, 352 N.W.2d 610 (1984); *Crosby v. American Stores*, 207 Neb. 251, 298 N.W.2d

157 (1980).

Other cases have challenged compensation claims on the basis that the variance in proof violated due process by not giving the defendant adequate notice of what it was to defend against. For example, in *Moore v. Carter Carb. Div. ACF Industries*, 628 S.W.2d 936 (Mo. App. 1982), the plaintiff filed a claim alleging disability by reason of inhaling gasoline fumes. At trial, however, the medical testimony attributed the disability to either the inhalation of gasoline fumes or the inhalation of emery dust, also found at the workplace, or to both. That court noted that technical rules of pleading and strict rules of evidence were to be avoided in compensation cases and ruled that there was sufficient evidence to identify the illness sustained and the probable cause or causes thereof to support the claim as filed.

In *City of Altoona v. Workmen's Comp. App. Bd.*, 50 Pa. Commw. 178, 411 A.2d 1322 (1980), the plaintiff alleged in his petition that he had suffered a heart attack on the job. The examining physician testified, however, that although plaintiff had suffered chest pains creating the need for hospitalization, he had not suffered a heart attack but, rather, some other heart malfunction. Noting that compensation pleadings were to be liberally construed, the court held that plaintiff had suffered some disabling injury to the heart in the course of employment and thus suffered a compensable injury.

Neb. Rev. Stat. § 48-168 (Reissue 1984) provides, among other things, that the compensation court shall not be bound by any technical or formal rules of procedure. Indeed, even the rules of civil procedure applicable to the district courts provide, in Neb. Rev. Stat. § 25-846 (Reissue 1985), that no variance between the allegations in a pleading and the proof shall be deemed material unless it has actually misled the adverse party to his or her prejudice and that the court may order the pleading amended under such terms as may be just. Making those observations, *Faulhaber v. Roberts Dairy Co.*, 147 Neb. 631, 24 N.W.2d 571 (1946), approved the compensation court's allowance of a postinitial hearing amendment to the workman's petition. The injured workman alleged he had hit his thumb with a hammer. After the initial hearing, at which the workman

testified as he had alleged in his petition, he was permitted to amend the petition to allege that some molten solder got caught in a bandage at the end of his thumb, which had not previously recovered from a prior injury. The workman's testimony at the rehearing then conformed with the allegations in the amended petition. In affirming an award of benefits to the workman, the *Faulhaber* court concluded that the workman's expanded testimony, which he justified by explaining that he simply had not thought of the second accident when testifying at the initial hearing, did not discredit him as a matter of law.

While the variance between the allegation Hayes made in her petition and the testimony she produced may bear on the issue of her credibility, the variance is not such as to discredit her as a matter of law. Neither was the variance between the allegations of the petition and the proof of such a nature as to deprive Cohron of due process by failing to advise it of the issue against which it was to defend, that is, whether Hayes sustained injury in an accident arising out of and in the course of her employment with Cohron.

There being no merit to Cohron's first assignment of error, we direct our attention to its second assignment, the claim that the evidence is insufficient to support the award.

There is no question but that a workers' compensation plaintiff has the burden of proving that an injury resulted from an accident arising out of and in the course of employment. *Laffin v. Nelson Enterprize*, 222 Neb. 226, 382 N.W.2d 371 (1986). Moreover, if it is claimed that the injury was the result of employment exertion, the evidence must show that the employment contributed to the cause of the injury in some material and substantial degree. *Crosby v. American Stores*, 207 Neb. 251, 298 N.W.2d 157 (1980). Further, the presence of a preexisting condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment. *Wilson v. City of North Platte*, 221 Neb. 90, 375 N.W.2d 134 (1985).

The essence of Cohron's argument is that the physician testified only that either the frequent use of her knees or the lifting of the beam could have caused Hayes' injury and resultant disability and did not testify with reasonable medical

certainty or probability that one of those alternative causes did in fact bring about the disability.

As we have noted previously, the meaning of words used by medical experts at times presents a problem of interpretation which may be resolved by the sense in which they were used. *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986). A fair reading of the physician's entire testimony leaves no doubt but that in his opinion it was reasonably certain from a medical point of view that the preexisting abnormal tilt of Hayes' right knee was aggravated either by the lifting of the beam or the frequent use of her knees to the point that the preexisting condition produced disability. What he was uncertain of was which of the two alternative possible employment causes was responsible, because either of them could be. Since, however, as our earlier analysis of Cohron's first assignment of error demonstrates, either cause would, in and of itself, qualify as an accident arising out of and in the course of employment, that uncertainty is immaterial.

The cases Cohron cites which reach contrary results are not applicable. *Scott v. State*, 218 Neb. 195, 352 N.W.2d 890 (1984), was an occupational disease case in which the medical evidence was interpreted to mean that the employee experienced only a normal progression of his preexisting condition. In *Caradori v. Frontier Airlines*, 213 Neb. 513, 329 N.W.2d 865 (1983), the evidence was only that the employment accident could have caused the disability, not, as in the present case, that one of two employment accidents did cause the disability. *Eliker v. D. H. Merritt & Sons*, 195 Neb. 154, 237 N.W.2d 130 (1975), does indeed hold that the failure to tie the injury and resultant disability to a specific work event fails to establish an accident which "arose in the course" of employment. It must be borne in mind, however, that *Eliker* was decided before development of the rule that in the case of an injury which develops over a period of time, the "in the course of" requirement is met by showing that employment exertion contributed in some material and substantial degree to cause the injury. See, *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982); *Crosby v. American Stores, supra.*

The second assignment of error thus fails, bringing us to

Cohron's third assignment, which claims that the compensation court erred in receiving into evidence the deposition of Hayes' coworker Kenney.

In that deposition Kenney testified that about an hour after he and Hayes had moved some I-beams, Hayes said that she could not stand it any longer, her right knee had given out. Cohron's contention is that since Kenney had failed to appear at several scheduled times to take his deposition, had not been subpoenaed to appear any of those times, and had not been subpoenaed to appear at the rehearing, it was an abuse of discretion to permit his deposition to be taken and submitted after the presentation of live testimony had been concluded. However, the compensation court's determination that it was the repeated use of her knees which caused Hayes' injury and resultant disability renders Kenney's deposition testimony irrelevant and immaterial to the disposition of this case. Thus, we need not, and therefore do not, decide the issue this assignment of error presents.

Cohron's fourth and last assignment of error argues that the compensation court erred in basing Hayes' permanent partial disability benefit upon a 45-hour workweek.

Section 48-121(4) provides in relevant part:

> For disability resulting from permanent disability, if immediately prior to the accident the rate of wages was fixed by the . . . hour, . . . the weekly wages shall be taken to be computed upon the basis of a work week of . . . a minimum of forty hours, if the wages are paid by the hour . . . .

Neb. Rev. Stat. § 48-126 (Reissue 1984) provides in relevant part:

> Wherever . . . the term wages is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident. . . . In continuous employments, if immediately prior to the accident the rate of wages was fixed by the . . . hour . . . his weekly wages shall be taken to be his average weekly income for the period of time ordinarily constituting his week's work, and using as the basis of calculation his earnings during as

> much of the preceding six months as he worked for the same employer . . . . The calculation shall also be made with reference to the average earnings for a working day of ordinary length and exclusive of earnings from overtime; *Provided*, that if the insurance company's policy of insurance provides for the collection of a premium based upon such overtime, then such overtime shall become a part of the basis of determining compensation benefits.

The evidence contradicts Hayes' stated expectation that she would work 45 hours per week. It establishes that she was paid $5.25 per hour for the first 8 hours of work per day and one and a half times that amount for work performed after the first 8 hours of work per day. The evidence also establishes that of the 7 full weeks Hayes worked for Cohron, there were only 3 weeks during which she worked 5 full days. It is clear that in each of those 3 weeks, she earned somewhat more than she would have earned by working no more than 8 hours per day, but there is no way to determine from the record how many hours she worked in any one day or how many hours she worked in any one of those 3 weeks. The record demonstrates, however, that she did not average 45, or for that matter 40, hours per week throughout her period of employment. While the record suggests that Cohron was insured, it does not reflect whether the insurer collected a premium based on Hayes' overtime work.

There is no question but that the wage rate is to be computed according to the contract of hire in force at the time of the accident. *Gruber v. Stickelman*, 149 Neb. 627, 31 N.W.2d 753 (1948); *Johnsen v. Benson Food Center*, 143 Neb. 421, 9 N.W.2d 749 (1943); § 48-126. The controlling inquiry is what that contract was. Irrespective of Hayes' stated expectation, the contract of employment was performed with a workweek of less than 40 hours. The acts of the parties and their practical interpretation of a contract while engaged in its performance before any controversy is one of the best indications of their true intent and meaning, and courts should ordinarily enforce such construction. *DeFilipps v. Skinner*, 211 Neb. 801, 320 N.W.2d 737 (1982). See, also, *Smith v. Daub*, 219 Neb. 698, 365

N.W.2d 816 (1985); *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983). If there exist facts which explain why the contract was for a workweek longer than the hours actually worked, it was incumbent upon Hayes, as the party with the burden of proof, *Laffin v. Nelson Enterprize*, 222 Neb. 226, 382 N.W.2d 371 (1986), to offer that explanation, not upon Cohron to show why evidence which appears to support its position in fact does not do so. Under the circumstances, § 48-121(4) requires that Hayes' permanent partial disability benefit be computed on the basis of a 40-hour week.

Since the record does not establish that overtime is to be considered, $5.25 is the appropriate hourly rate to be used for each of the 40 hours.

We therefore affirm but modify the award of the compensation court and remand the cause to that court with the direction that it enter an award which is consistent with this opinion.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTION.

CAPORALE, J., dissenting in part.

While I agree with the majority's analysis and resolution of the wage issue, I must nonetheless dissent.

It seems to me that the fear expressed in my dissent in *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982), has come to pass by the majority's resolution of this case. Mere hard work has become an "accident . . . arising out of and in the course of . . . employment" within the meaning of Neb. Rev. Stat. § 48-101 (Reissue 1984). According to the majority, there was an accident because plaintiff used her knees in doing her work, and the accident arose out of the employment because she felt pain while she was at work. Such a thought process fleeces of any meaning the word "accident" and the phrase "arising out of."

For the reasons expressed in *Sandel v. Packaging Co. of America, supra*, I would find the plaintiff failed to sustain the burden of proving she suffered an injury resulting from an accident arising out of and in the course of her employment. I thus would reverse the judgment of the compensation court and

direct dismissal of the action.

BOSLAUGH and HASTINGS, JJ., join in this dissent.

SANDRA JEAN WILSON, APPELLEE, V. RICHARD ALAN WILSON, APPELLANT.

399 N.W.2d 802

Filed January 23, 1987. No. 86-251.

1. **Child Custody.** Joint custody is not favored by the courts of this state and will be reserved for only the rarest of cases.
2. **Modification of Decree: Child Support.** A significant increase in the appellant's income, along with the increased ages of the children and the inability of the appellee to afford to pay the children's bills on the current support payment, meets the requirement of a material change in circumstances and supports the trial court's decision to modify child support payments.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed as modified.

Miles W. Johnston, Jr., of Johnston, Wherry & Knight, for appellant.

Steven J. Reisdorff of The Law Office, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal from the district court for Saline County. The parties to this case, Sandra Jean Wilson and Richard Alan Wilson, were divorced on October 4, 1982. As part of the decree the court approved a property settlement agreement. The property settlement agreement provided for the joint custody of their four children. Specifically, the appellee, Sandra Wilson, was awarded custody of the children during the school year, and the appellant had rights of visitation during every other weekend and holiday. The custody and visitation arrangements were reversed during the summer months. Richard Wilson was also ordered to pay $50 per month per child

during the time when the children were with their mother, but was excused from payment during the time the children were with him. In an addendum to the original property settlement, the appellant was ordered to pay one-half of all medical expenses and to obtain and maintain health insurance coverage on the children.

In March of 1984 the decree was modified to provide that the appellant pay a total of $200 per month child support except in any month in which he has the children 25 days or more. The appellant was also ordered to pay all reasonable and necessary medical expenses incurred by the children.

The third and final modification of the visitation, custody, and support rights came in March of 1986. The appellee was given custody of the children. The appellant was given visitation for 30 days in the summer, along with every other weekend, and was excused from the payment of support during that time. The appellant was permitted to pick up his children at 6 p.m. on Friday and return them at 7 p.m. on Sunday. He was also ordered to maintain present health care obligations.

This appeal follows the final modification. Appellant assigns error to the trial court's modification of the custody, support, and visitation provisions of the decree. We affirm as modified.

Addressing the issue of the custody of the four minor children, the appellant argues that the trial court erred in changing the custody of the Wilson children from joint custody in both parents to custody in the children's mother. Neb. Rev. Stat. § 42-364(3) (Cum. Supp. 1986) permits joint custody only in situations where both parents agree, and then only after a public hearing is conducted on that issue. Regardless of any agreement by the parents on the outcome of the public hearing, the court must find that joint custody is in the best interests of the children.

We have, in our previous opinions on the issue of joint custody, stated explicitly that joint custody is not favored and must be reserved for only the rarest of cases. *Trimble v. Trimble*, 218 Neb. 118, 352 N.W.2d 599 (1984); *Korf v. Korf*, 221 Neb. 484, 378 N.W.2d 173 (1985). Although each parent has shown only love and affection for the children, our review of the record makes apparent that the Wilsons' inability to

agree on custody arrangements has disrupted the children's home life and caused much unneeded stress. Although each parent is capable of providing a secure and happy home for the children, it is in the best interests of the children that there be only one custodial parent. From a de novo review of the record, which we are required to conduct, we find that the district court has made an admirable effort to find a solution for a situation in which none is really apparent. We find no abuse of discretion and affirm the district court's placement of the custody of the children with the appellee.

Appellant next assigns as error the district court's change of child support from a total of $200 per month to $120 per month per child. Questions relating to the modification of child support are entrusted to the sound discretion of the trial court. Although our review is de novo on the record, absent an abuse of discretion on the part of the trial court the decision of the trial court will be affirmed on appeal. *Wagner v. Wagner, ante* p. 155, 396 N.W.2d 282 (1986).

The rule is well established that, absent a material change of circumstances, child support payments are not subject to modification. *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985). The record reveals that the appellant's income has increased from over $10,000 in 1983 to over $19,000 in 1984. The appellant argues that this increase in income does not justify the lower court's increase in support payments. The appellee testified in court that the $200 per month she currently received in child support barely enabled her to feed the children and did not provide extra money to pay any additional expenses.

In *Morisch v. Morisch*, 218 Neb. 412, 413, 355 N.W.2d 784, 785-86 (1984), this court enumerated the situations which would meet the requirement of a material change of circumstances as follows:

> "Material change in circumstances" in reference to modification of child support is analogous to modification of alimony for "good cause." See Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982); cf. *Chamberlin v. Chamberlin*, 206 Neb. 808, 814, 295 N.W.2d 391, 395 (1980) (modification of alimony on account of a "change

> of circumstances of a material and substantial nature"). "Material change in circumstances" eludes precise and concise definition. Courts may consider various factors to determine if a material change in circumstances has occurred. Among some of the factors or circumstances considered by a court are a *change in the financial resources or ability to pay on the part of the parent obligated to pay support*, needs of the child or children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction of income, and the duration of the change, namely, whether the change is temporary or permanent. See 24 Am. Jur. 2d *Divorce and Separation* §§ 1082-1088 (1983). Alteration and passage from one condition to another is essential for a material change in circumstances.

(Emphasis supplied.)

We also note *Pfeiffer v. Pfeiffer*, 201 Neb. 56, 266 N.W.2d 82 (1978), where a change in support obligations was partially justified by the increase in the father's salary, and *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986), where this court stated that the determination of whether a material change in circumstances occurred involves, among other things, a consideration of whether a change in the financial resources of the parents has occurred.

The record does not contain specific notations which indicate that the parties anticipated this significant increase in the appellant's income. *Wagner v. Wagner, ante* p. 155, 396 N.W.2d 282 (1986). We find, therefore, that the appellant's increase in income, along with the increased ages of the children and the inability of the appellee to afford to pay the children's bills on the current support payments, meets the requirement of a material change in circumstances and permits the modification of support payments. We find no abuse of discretion in the lower court's actions.

Appellant's final assignment of error involves the failure of the trial court to provide for holiday visitation in the final order. In *Manewal v. Manewal*, 220 Neb. 867, 868, 374 N.W.2d 39, 40 (1985), this court stated:

> We hold that determinations as to visitation rights in a

> dissolution of marriage case are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; keeping in mind, however, that the trial judge observed and heard the witnesses at some point in the trial and accepted one version of the facts rather than the other.

Our review of the record reveals no reason why the appellant was not granted visitation with his children on holidays, especially in light of the fact that the appellant had visitation in the past. We find that the trial judge abused his discretion in failing to provide appellant holiday visitation with his children.

We will now set out the holiday visitation schedule which will govern the parties to this case. Holiday visitation will include only the following holidays. (1) *Easter*. The Easter holiday will include that period of time during which the children are excused from school for the Easter holiday, including Easter Sunday, and shall commence at 8:30 a.m. on the day after the children are released from school and end at 7 p.m. on the day before the children return to school. (2) *Memorial Day weekend*. This holiday shall include only that weekend when Memorial Day is nationally recognized and shall commence at 8:30 a.m. on Saturday and conclude at 7 p.m. on Monday, Memorial Day. (3) *Fourth of July*. The Fourth of July shall include only the day on which Independence Day is nationally recognized and shall commence at 8:30 a.m. and conclude at 7 p.m. (4) *Labor Day weekend*. This holiday shall include only that weekend on which Labor Day is nationally recognized and shall commence at 8:30 a.m. Saturday and conclude at 7 p.m. on Monday, Labor Day. (5) *Thanksgiving*. This holiday shall be defined as that period of time during which the children are excused from school for the Thanksgiving holiday, including Thanksgiving, and shall commence at 8:30 a.m. on the day after the children are released from school and conclude at 7 p.m. on the day before the children return to school. (6) *Christmas*. The Christmas holiday shall be defined as that time during which the children are excused from school for the Christmas holiday and shall commence at 8:30 a.m. on the day after the children are released from school and conclude at

noon on December 31. (7) *New Year's Day*. The New Year's Day holiday shall commence at noon on December 31 and conclude at 7 p.m. on the day before school is to begin.

The children shall be returned to the custodial parent at the conclusion of each holiday. In even-numbered years the mother shall have the children for the even-numbered holidays, and Mr. Wilson shall have the children on the odd-numbered holidays. In odd-numbered years the children shall remain with their mother for odd-numbered holidays and spend the even-numbered holidays with the appellant. The children will spend Mother's Day with their mother and Father's Day with their father. For Mother's Day and Father's Day only, the holiday will commence at 8:30 a.m. and conclude at 7 p.m. on the Sunday on which these holidays are nationally observed. This holiday visitation schedule shall supersede the regular weekend visitation schedule. The regular weekend visitation schedule will continue with the parent who did not have the children on the previous holiday and continue on from that point, alternating between the parents every other weekend. We affirm as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. DARRYL W. HUNT, APPELLANT.
399 N.W.2d 806

Filed January 23, 1987. No. 86-344.

1. **Convictions: Directed Verdict.** A trial court is justified in directing a verdict of not guilty in favor of a defendant in a criminal case only where there is a total failure of competent proof to support a material allegation in the information or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained.
2. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish defendant's guilt beyond a reasonable doubt.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

James Martin Davis and John William Davis, for appellant.

Robert M. Spire, Attorney General, Laura L. Freppel, and Lisa D. Martin-Price, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

The defendant, Darryl W. Hunt, appeals his conviction in the district court for Douglas County. The defendant was convicted, after jury trial, of possession with intent to distribute, deliver, or dispense a controlled substance, marijuana, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1985). He was sentenced to imprisonment in the Nebraska Penal and Correctional Complex for a period of not less than 3 nor more than 5 years. In his appeal defendant alleges only that the district court erred in overruling defendant's motion for a directed verdict in that the evidence was insufficient as a matter of law to sustain the conviction. For the reasons hereinafter stated, we affirm.

The record discloses that on the afternoon of September 16, 1985, officers of the Omaha Police Department, pursuant to a valid search warrant, conducted a search of apartment E at 6606 North 51st Plaza, Omaha, Nebraska. The apartment was leased to Denise Abram. When the police entered the apartment, Denise Abram and two of her minor children were there, as well as defendant Darryl Hunt. As a result of the search, a quantity of marijuana was seized, as well as a pad of unused, printed bank checks with the defendant's name and the address of "6606 N. 51st Plaza, No. E," on them; an envelope from a different bank addressed to the defendant at that address and postmarked April 15, 1985; $376 in cash; and a slip of paper with a list of names and amounts owed. The defendant was placed under arrest and subsequently charged with possession of a controlled substance, marijuana, with intent to deliver.

We first note that this court has held that a trial court is justified in directing a verdict of not guilty in favor of a defendant in a criminal case only where there is a total failure of competent proof to support a material allegation in the information or where the testimony adduced is of so weak or

doubtful a character that a conviction based thereon could not be sustained. *State v. Kane, ante* p. 245, 397 N.W.2d 628 (1986); *State v. Bridger,* 223 Neb. 250, 388 N.W.2d 831 (1986). While the evidence presented against the defendant in the case at bar is largely circumstantial, circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish defendant's guilt beyond a reasonable doubt. *State v. Kane, supra; State v. Ellis*, 223 Neb. 779, 393 N.W.2d 719 (1986); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981). Further, it is not the responsibility of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. That task is for the jury, and its verdict of guilty must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Kane, supra*. See, also, *State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985).

An examination of the record, with those standards in mind, discloses the following. Abram testified that defendant was not a resident of her apartment, and other witnesses testified that defendant lived at a residence other than 6606 North 51st Plaza, apartment E. The State adduced other evidence which, if believed by the jury, established that defendant's residence was the apartment in question. Such evidence included the undisputed facts that at the time the police entered the apartment defendant was bathing in the bathtub in the apartment and that clothing belonging to him was piled in the middle of the floor in the master bedroom. Other evidence showed that, in the presence of defendant, Abram told the police lieutenant in charge of the search party that the master bedroom was messy because "That's not my room, that's his room, he lives there," referring to defendant. Other undisputed evidence showed that defendant was the father of three of Abram's four children. In addition, as set out above, the police search of the apartment disclosed imprinted blank checks bearing defendant's name and the address of the apartment in question, as well as mail directed to defendant at the apartment address.

Defendant argues that he was merely present in the

apartment and that under the rule this court set out in *State v. Faircloth*, 181 Neb. 333, 148 N.W.2d 187 (1967), and quoted with approval in *State v. Klutts*, 204 Neb. 616, 284 N.W.2d 415 (1979), his mere presence is not sufficient evidence to establish that he was a resident of the apartment or, in any event, that the evidence did not show that he had sufficient knowledge of the presence of the marijuana to have intent to possess it.

In the case at bar, the evidence showed more than mere presence at the apartment. Defendant's bathing in the apartment at 4 p.m., together with the other facts as set out above, affords sufficient evidence to support a determination that defendant was a resident of the apartment in question. Once that fact is established, it is a reasonable inference for the jury to believe that an occupant of the apartment was aware of the presence of such quantities of marijuana and cash, and therefore had the intent to possess such items. The evidence further furnished a reasonable inference that a person of the established limited economic means of Abram could not alone own such a quantity of cash and marijuana as found in the apartment.

We hold that the evidence in the case at bar was sufficient, when taken as a whole, to establish beyond a reasonable doubt that defendant was a resident of the apartment, knew of the presence of the marijuana, and had the intent to possess that marijuana.

Insofar as defendant argues that in any event the evidence was not sufficient, as a matter of law, to support a finding of guilt of possession with intent to deliver, we determine that argument is without merit. The marijuana seized during the search was packaged in sandwich bags with a seal across the top, referred to as "nickel" and "dime" bags. At trial, Lieutenant Crowley of the Omaha Police Department testified that, when packaged for street sale, marijuana is normally placed in small sandwich bags in quantities of approximately 1/2 ounce (a "nickel" bag of a value of approximately $5) and approximately 1 ounce (a "dime" bag with a value of approximately $10). The jury could have properly drawn an inference that the marijuana found in the apartment was packaged for street sale. Such an inference is further supported

by the finding of a sack containing 42 "nickel" bags and 25 "dime" bags, together with $376 in bills and coins, located under the sink in the kitchen. In a closet, the police also found an "I.O.U. Sheet" containing names and dates listed as "Date got," "Amount," and other dates listed as "D.B. Back," as well as an additional 11 "nickel" bags and 4 "dime" bags. We determine the evidence was sufficient to support the jury's finding of guilty of possession of marijuana with intent to deliver. The judgment of the district court is affirmed.

AFFIRMED.

THOMAS H. GLOCKEL, PLAINTIFF, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A FOREIGN CORPORATION, DEFENDANT.

400 N.W.2d 250

Filed January 23, 1987. No. 86-361.

1. **Insurance: Rescission: Words and Phrases.** The cancellation of an insurance policy is not a rescission, since a rescission avoids the contract ab initio. A cancellation merely terminates the policy as of the time when the cancellation becomes effective.
2. **Insurance: Statutes.** Unless a cancellation statute is manifestly all-inclusive, a statute specifying the instances under which a party to an insurance contract may cancel it does not make cancellation the exclusive remedy, and it is not in derogation of other remedial rights which are recognized and implemented by other provisions of law.
3. **Insurance: Rescission: Fraud.** Neb. Rev. Stat. §§ 44-515 to 44-521 (Reissue 1984) do not prevent an insurer from rescinding an automobile liability insurance policy for material misrepresentations made by the insured in the application for the policy.
4. _____: _____: _____. Neb. Rev. Stat. § 44-358 (Reissue 1984) limits but does not eliminate the right of an insurer to rescind an automobile liability insurance policy for fraud in the application.
5. _____: _____: _____. An accident resulting in injury or damage to a third person does not destroy the right of an insurer to rescind an automobile liability insurance policy for fraud in the application.

Certified Questions from the U.S. District Court for the District of Nebraska. Judgment entered.

Peter J. Peters, P.C.; Warren C. Schrempp and Peter J. Hoagland; and Wallace Hopkins, P.C., and Steven M. Watson of Marks, Clare, Hopkins, Rauth, Cuddigan, Offner & Watson, for plaintiff.

Joseph K. Meusey and Joseph E. Jones of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for defendant.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

This case is before the court a second time on a certification of questions of law from the U.S. District Court for the District of Nebraska, pursuant to Neb. Rev. Stat. §§ 24-219 to 24-225 (Reissue 1985).

In 1985 the following three questions were certified to us:

> 1. Whether the *exclusive* method of terminating an automobile liability insurance policy is controlled by [Neb. Rev. Stat. §§ 44-515 to 44-521 (Reissue 1984)].
>
> 2. Whether, because of the provisions of [§ 44-515(1)(b)], an automobile liability insurance policy can only be *cancelled* for "material misrepresentations" once a policy of insurance has been issued.
>
> 3. Whether [Neb. Rev. Stat. § 44-358 (Reissue 1984)] is inapplicable to an automobile liability insurance policy.

(Emphasis in original.) *Glockel v. State Farm Mut. Auto. Ins. Co.*, 219 Neb. 222, 225, 361 N.W.2d 559, 561 (1985) (hereinafter referred to as *Glockel I*).

In *Glockel I, supra*, the first certified question was answered "Yes," and this court stated that "the only way to cancel the automobile liability policy represented by Glockel's application, Glockel's premium payment, and State Farm's binder (assuming that the policy is one described in § 44-514) is to follow the procedures set out in §§ 44-515 and 44-516." 219 Neb. at 229, 361 N.W.2d at 564. Neb. Rev. Stat. § 44-515 (Reissue 1984) limits the grounds for cancellation of policies of the type defined in Neb. Rev. Stat. § 44-514 (Reissue 1984). Among the grounds upon which cancellation may be based is

"fraud or material misrepresentation affecting the policy or in the presentation of a claim thereunder . . . ." § 44-515(1)(b). Neb. Rev. Stat. § 44-516 (Reissue 1984) provides in relevant part: "(1) No notice of cancellation of a policy to which section 44-515 applies shall be effective unless mailed by registered or certified mail to the named insured at least thirty days prior to the effective date of cancellation . . . ."

The second question certified in *Glockel I, supra*, was answered "No" because a § 44-514 type of automobile liability policy can be canceled for reasons other than material misrepresentation, which additional reasons are set out in § 44-515(1)(a) and (c).

The third question certified in *Glockel I, supra*, was answered "Yes"; that is, Neb. Rev. Stat. § 44-358 (Reissue 1984) was held to be inapplicable to automobile liability policies insofar as it conflicts with Neb. Rev. Stat. §§ 44-514 et seq. (Reissue 1984). Section 44-358 provides:

> No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation or warranty deceived the company to its injury. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding.

After the U.S. District Court had received a certified copy of our opinion in *Glockel I*, Glockel moved for summary judgment on grounds that State Farm had no right, as a matter of Nebraska law, to rescind or terminate his policy ab initio after the loss. In support of this motion, Glockel relied solely on the answers to the certified questions in *Glockel I, supra*. He interpreted those answers to mean "that an insurer has no right, under the statutes of Nebraska, to rescind a liability binder policy after it is issued."

The U.S. District Court concluded that, while we had determined that §§ 44-515 to 44-521 provided the exclusive

methods for cancellation of this class of automobile liability insurance policies, "the ultimate issue . . . dealing with an insurance carrier's right to rescind a policy was not addressed." This conclusion was based on the fact that the *Glockel I* court had strictly limited itself to answering the certified questions presented and that nowhere in the questions themselves was the term rescission mentioned.

In the memorandum and order, filed December 23, 1985, the district court stated:

> In short, the crucial issue in this action is whether an insurance company has the right to rescind a policy under Nebraska law after an insured has suffered a loss or a third party has been injured by the insured.
>
> This Court's reading of the Nebraska Supreme Court's opinion in Glockel leads it to conclude that the crucial issue in this case was not squarely addressed by the Nebraska court's answers to the certified questions. This was probably due to the framing of the questions, none of which went to the heart of the relevant issue. Due to the limited review that the court has of certified questions, as opposed to reviewing "the matter as an appeal from a specific judgment or ruling of a trial court", Glockel, 219 Neb. at 227, 361 N.W.2d at 563, it appears that the Nebraska Supreme Court chose not to stray from the questions presented. The crucial question, therefore, was never answered by the court.
>
> This conclusion is supported by statements made by the court in the Glockel opinion. The court noted: "While the parties brief what seems to be the real issue in the case - that is, when does a purported rescission or cancellation take place? - that question is not submitted to us for answer. . . . Indeed, the question whether rescission and cancellation signify the same concept or have the same or different meanings under Nebraska law is not submitted on this point. * * * Various jurisdictions take differing positions on the question. Since the question is not submitted to us, we will answer the certified questions assuming that it does not make any difference in our answers which concept is applicable in Nebraska." Id. at

> 227, 361 N.W.2d at 563. The court also noted the ambiguity of the second question posed problems in the formulation of an answer, when it stated: In the [second] question the word "cancelled" is underlined, which seems to indicate that canceled means something different than some unexpressed concept. It would be a gratuitous assumption on our part to answer that the parties seek to have us differentiate between cancellation and rescission, so our answer will assume, for purposes of this answer only, that the two terms mean the same. Id. at 230, 361 N.W.2d at 564.
>
> Looking at the certified questions themselves, nowhere is the term "rescission" mentioned. Rather, the questions revolve around the Nebraska statutes governing automobile insurance policies and their respective cancellation requirements. The Nebraska Supreme Court noted that the exclusive methods for cancellation of an automobile liability insurance policy are set forth in Neb.Rev.Stat. Sections 44-515 to 44-521 (Reissue 1984), however, the ultimate issue in this case dealing with an insurance carrier's right to rescind a policy was not addressed.
>
> The Nebraska Supreme Court's reluctance to distinguish between "cancel" or "rescind" is evident when it stated: It appears to us that the questions presented seek to determine if an automobile liability insurance policy can be either "canceled," "rescinded," or "terminated" ab initio, rather than prospectively. In answering the questions certified to us, it is really of no concern at this point whether the words "rescission" or "cancellation" mean the same or not. Indeed, if defendant's contention is that recission [sic] is the only way to avoid a contract ab initio, then ab initio rescission is not available under Sections 44-515 to 44-521 because the term "rescission" is not used in any way in such sections. 219 Neb. at 228, 361 N.W.2d at 563.

The district court determined that *Glockel I, supra,* clearly held that an insurance carrier could not rescind a policy ab initio under §§ 44-515 to 44-521. Nevertheless, the district court

concluded that *Glockel I* did not indicate "whether an insurance carrier can 'rescind' a policy ab initio in a manner other than that dictated by statute, such as a common law right advocated by State Farm." The district court overruled Glockel's motion for summary judgment because the *Glockel I* opinion failed to address the question as to whether there is a right to rescind an insurance policy ab initio after a loss.

On April 24, 1986, State Farm's motion to certify additional questions of law to this court was sustained. The certified questions that have been submitted to us are:

> 1. Assuming Glockel's Application for a [Neb. Rev. Stat. § 44-514 (Reissue 1984)] type of automobile liability insurance policy was fraudulent, did State Farm have the right to declare its binder void from its inception under Nebraska statutory law or common law or both.
>
> 2. Did the right exist even though a loss occurred which caused damage to Leon J. Skank, who is not a party to the insurance contract.

In answering these questions we are required to assume the following facts are true:

> "Plaintiff, Thomas H. Glockel (hereinafter referred to as Glockel), applied to defendant, State Farm Mutual Automobile Insurance Company (hereinafter referred to as State Farm), for an automobile liability insurance policy on April 29, 1980. Glockel signed the application and paid $54.98 for the first 2 months' coverage. In his application, Glockel listed one traffic violation, a stop sign infraction in October of 1979. State Farm's agent bound coverage on April 29, 1980, and, on or about the same day, forwarded the application to State Farm's regional office in Lincoln, Nebraska. The policy was issued to Glockel and his father.
>
> Four days later, on May 3rd, 1980, Glockel was involved in an automobile accident that caused extremely serious injuries to one Leon Skank. At some point, the Lincoln underwriting office discovered that Glockel's Nebraska motor vehicle record revealed two traffic violations instead of just one. On May 7, 1980, Glockel gave a recorded statement to a State Farm investigator

admitting that he had received "two or three" speeding tickets in Council Bluffs, Iowa between June and August of 1979. State Farm thereafter convened a "claim committee" to evaluate the status of Glockel's policy. The claim committee determined that Glockel had made a material misrepresentation concerning his driving record. In a June 9, 1980, letter addressed to plaintiff, Glockel and his father, State Farm advised that, because of Thomas Glockel's misrepresentations, it was rescinding the binder of insurance and declaring it void at its inception. State Farm also returned Glockel's $54.98 premium payment.

Kandis K. Skank, as Conservator for her husband, Leon, filed suit in the District Court of Douglas County, Nebraska, against Thomas Glockel alleging negligence in the May 3, 1980 operation of his motor vehicle. Her attorneys sent written offers to Glockel's attorneys to settle the lawsuit for the $15,000 limit of Glockel's policy. Glockel's attorney communicated the offers to State Farm and demanded settlement. State Farm rejected the offers and refused to settle on the basis of its June 9, 1980 letter of rescission. The jury returned a verdict against Thomas Glockel substantially in excess of the policy limits.

Glockel's complaint in the United States District Court alleges negligence and bad faith by State Farm for refusing to settle the underlying lawsuit within the $15,000 policy limit. Mr. Glockel seeks a judgment against State Farm for the $15,000 insurance coverage and the amount by which the state court judgment exceeds the policy limit, plus interest and attorneys' fees. He further requests damages for mental and emotional distress, unfavorable publicity, and injury to his credit and reputation. State Farm, by affirmative defense, alleges that Glockel misrepresented material facts regarding his driving record in his application for insurance and that, under Nebraska law, State Farm may therefore rescind the policy and declare it void ab initio."

QUESTION NO. 1

A careful review of the applicable statutes, legislative history, *Glockel I, supra*, and related case law demonstrates that the

answer to question 1 is Yes, State Farm did have the right to declare its binder void from its inception under both Nebraska statutory and common law.

At first glance, the answer to the first certified question in *Glockel I* suggests a contrary result. But in holding that §§ 44-515 to 44-521 provided the exclusive method of terminating an automobile liability insurance policy, we made no attempt to distinguish between the concepts of cancellation, termination, or rescission.

In 17 G. Couch, Couch Cyclopedia of Insurance Law § 67:35 at 487 (rev. ed. 1983), the text states that "[t]he cancellation of an insurance policy is not a rescission, since a rescission avoids the contract ab initio whereas a cancellation merely terminates the policy as of the time when the cancellation becomes effective."

In *Gov't Employees Ins. Co. v. Chavis*, 254 S.C. 507, 516, 176 S.E.2d 131, 135 (1970), the Supreme Court of South Carolina wrote that

> cancellation refers to the termination of the policy prior to the end of the policy period, and termination refers to the expiration of policy by the lapse of the policy period. Rescission is not merely a termination of contractual obligation but is abrogation or undoing of it from the beginning, which seeks to create a situation the same as if no contract ever had existed. [Citation omitted.] The cancellation of a liability insurance policy operates prospectively and is to be distinguished from rescission which destroys the policy *ab initio*. In the case of *Ray v. Beneficial Finance Co.*, 92 N. J. Super. 519, 224 A. (2d) 143, it was held that "rescission" contemplates return to *status quo ante*.

See, also, *United Security v Ins Comm'r*, 133 Mich. App. 38, 348 N.W.2d 34 (1984).

Section 44-358, while not expressly using the term rescission, has been interpreted by this court to recognize the right to avoid a policy under certain circumstances in the case of material misrepresentations by an insured. See, *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982); *MFA Mut. Ins. Co. v. Meisinger*, 183 Neb. 285, 159 N.W.2d 829 (1968). The

remedy in the former case was in the nature of rescission because the successful insurer avoided liability on the policy as if it had never existed.

In other cases, this court has recognized the right to void or rescind an automobile liability policy ab initio for material misrepresentations, without express reference to § 44-358. *Dairyland Ins. Co. v. Kammerer*, 213 Neb. 108, 327 N.W.2d 618 (1982); *Reserve Ins. Co. v. Aguilera*, 181 Neb. 605, 150 N.W.2d 114 (1967).

In the *Kammerer* case, the insurer attempted to rescind the policy for fraud in the application, but failed to return the entire premium it had received. In that case we said:

> When learning of the alleged fraud, Auto-Owners had two choices. Either it could determine that, because of the alleged fraudulent statements made to it, it wished to cancel the policy from its inception and return to Popish the entire premium, on the theory that the policy never came into existence, or it could waive the alleged fraud, keep the premium earned to date of cancellation, and accept responsibility under the policy. If Auto-Owners elected to rescind the policy from its inception, it must place Popish back in the same position Popish was in before the policy was issued, including returning to her all of the premium. But Auto-Owners chose not to do so. Both by its notice of cancellation and by its retention of a portion of the premium, Auto-Owners elected to recognize the existence of the policy from the date of its issuance on March 5, 1980, until the date of its declared cancellation on April 22, 1980. Having made that choice, Auto-Owners acknowledged that the policy was in effect on the date of the accident, March 27, 1980, and it therefore became liable under the policy. Auto-Owners could not, on the one hand, recognize the existence of the policy and retain a portion of the premium and, on the other hand, deny the coverage afforded by the policy because of alleged fraudulent misrepresentations.

213 Neb. at 110-11, 327 N.W.2d at 620.

The use of the word "cancel" in the second sentence of the paragraph quoted above was unfortunate. The proper term was

rescind. However, the meaning is clear from the context and any possible confusion as to the meaning may be eliminated by substituting the word "rescind" for the word "cancel" in the second sentence of the paragraph quoted.

While these cases suggest a common-law right to rescission, that right appears to be subject to the limitations imposed by § 44-358. See *Zimmerman v. Continental Cas. Co.*, 181 Neb. 654, 150 N.W.2d 268 (1967) (setting out interpretation of requirements of § 44-358). Perhaps it is most accurate to state that in Nebraska there is a common-law right to rescind or avoid insurance policies for material misrepresentations, which is recognized in and limited by § 44-358.

In a recent case involving an insurer's attempt to rescind an automobile insurance binder on grounds of material misrepresentation, the Michigan Court of Appeals rejected the argument that the subsequent enactment of a statute controlling cancellation of such policies implied an intent to preclude rescission ab initio. *United Security v Ins Comm'r*, 133 Mich. App. 38, 348 N.W.2d 34 (1984). The court noted: "Rescission is insufficiently similar to cancellation to support the conclusion that the Legislature's enactment of a statute controlling cancellation of an automobile insurance policy without mentioning rescission demonstrates the Legislature's intent to preclude rescission." *Id.* at 42, 348 N.W.2d at 35.

Recognizing the distinctions between the remedies, it cannot be said that a statute controlling the methods of and reasons for cancellation or termination of an automobile liability policy precludes rescission.

The answer to the third certified question in *Glockel I*, however, also seems to suggest that there is no longer a right to rescission in a case such as this. The answer was based on the fact that § 44-358 is a general statute while §§ 44-514 et seq. are special provisions relating to a particular subject. *Glockel I, supra.* Such special provisions are usually interpreted to prevail over general ones to the extent they conflict. *Glockel I, supra.* Consistent with this rule of statutory construction, the court held that "[s]ection 44-358 is inapplicable to automobile liability policies insofar as it conflicts with §§ 44-514 et seq." *Glockel I*, 219 Neb. 222, 232, 361 N.W.2d 559, 565 (1985). We

did not, however, indicate the extent, if any, of the conflict between the two provisions.

In *SID No. 1 v. County of Adams*, 209 Neb. 108, 306 N.W.2d 584 (1981), this court indicated that where a general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act is considered an exception to the general statute.

In the present case, the provisions in question relate to different matters: cancellation or termination, on the one hand, and rescission, on the other. As such, the provisions do not conflict.

Unless a cancellation statute is

> manifestly all-inclusive, it is held that a statute in specifying the instances under which a party to an insurance contract may cancel it does not make such cancellation the exclusive remedy, and it is not in derogation of other remedial rights which are recognized and implemented by other provisions of law.

17 G. Couch, Couch Cyclopedia of Insurance Law § 67:54 at 500-01 (rev. ed. 1983).

A review of the legislative history of §§ 44-514 to 44-521 shows that cancellation was not intended to be the exclusive remedy for material misrepresentations made by an insured, but that the reasons for and the methods of cancellation were meant to be limited by the relevant provisions. The statement of purpose as to the bill later enacted as §§ 44-514 et seq. indicates that "LB 1396 is an act relating to automobile liability insurance. It prescribes the conditions for cancellation and nonrenewal of liability coverages, provides for written notice of such cancellation or nonrenewal, and defines certain pertinent terms." Statement of Purpose, L.B. 1396, Banking, Commerce and Insurance Committee, 82d Leg., 2d Sess. (Feb. 2, 1972). Nowhere in the legislative history or statutes themselves is there language mentioning rescission or avoidance nor indicating that those remedies were to be eliminated by enactment of the statutory cancellation scheme. Instead, the purpose of the statutes was to ensure that notice is given when cancellation is the remedy utilized and to limit the circumstances under which cancellation may be had. Banking, Commerce and Insurance

Committee Hearing, L.B. 1396, 82d Leg., 2d Sess. (Feb. 15, 1972). See, generally, *Glockel I, supra*.

In light of these facts, it is evident that § 44-358 and §§ 44-514 to 44-521 relate to different matters and are therefore not in conflict. As such, the right to rescission as limited by § 44-358 is still available to an insurer regarding policies of the type defined in § 44-514.

QUESTION NO. 2

The answer to question 2 is Yes, the right to rescind did exist even though a loss occurred which caused damage to Leon Skank, who was not a party to the insurance contract.

The only Nebraska case which appears to have directly touched on this issue is *Reserve Ins. Co. v. Aguilera*, 181 Neb. 605, 150 N.W.2d 114 (1967). That case arose prior to the enactment of the cancellation statutes embodied in §§ 44-514 to 44-521. In *Aguilera*, the plaintiff insurance company sought a judicial determination that an automobile liability policy issued to the defendant insured was void ab initio because it was obtained by misrepresentation in the application for the policy. The action arose after the insured was involved in an automobile accident which resulted in the death of a third party, whose widow was an intervenor in the case. One of the contentions on appeal from the judgment for the insurer was that under Neb. Rev. Stat. § 60-538 (Reissue 1984) of the Motor Vehicle Safety Responsibility Act, the liability of the insurer became absolute when the accident occurred. That statutory provision provided then, as it does now:

> (1) The liability of the insurance carrier with respect to the insurance required by sections 60-501 to 60-569 shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs . . . no statement made by the insured or on his behalf . . . shall defeat or void said policy . . . .

§ 60-538.

In affirming the judgment this court determined that "[t]he first accident is not within the purview of the Motor Vehicle Safety Responsibility Act, nor does the act have any application to an insurance policy which has not been used as proof of financial responsibility in the future." *Aguilera, supra* at 607,

150 N.W.2d at 117.

A survey of the case law in other jurisdictions reveals a division of authority as to whether an injury to a third party eliminates the insurer's right to rescind the policy on the basis of material misrepresentations by the insured.

In the cases holding that the right to rescind is cut off by injury to a third party, the courts have generally recognized some underlying policy in their respective insurance statutes which aims to protect the rights of the innocent third-party victims of automobile accidents. In several of the cases the insurer's liability was determined on the basis of whether the policy was or should have been issued in accordance with a financial responsibility law. *Century Indemnity Co. v. Simon*, 77 F. Supp. 221 (D.N.J. 1948) (insurer liable to third party, but not insured, because policy was issued under New Jersey's financial responsibility law and beneficiaries of the law are the members of the public who may be injured in motor accidents); *Richard v. Fliflet*, 370 N.W.2d 528 (N.D. 1985) (insurer could not rescind policy after injury to third party, where the insurance policy, although voluntary, was purchased to avoid sanctions of financial responsibility law and purpose of law is to protect innocent victims of automobile accidents from financial disaster); *Nationwide Mut. Ins. Co. v. Conley*, 156 W. Va. 391, 194 S.E.2d 170 (1972) (insurer not liable to insured or injured third party because policy was issued voluntarily and not under the compulsion of an assigned risk or financial responsibility law); *Safeco v. Gonacha*, 142 Colo. 170, 350 P.2d 189 (1960) (insurer not liable to insured or injured third parties where policy was a voluntary as opposed to a mandatory one as required by financial responsibility law, and where Colorado had no compulsory insurance law); *Mollihan v. Stephany*, 52 Ill. App. 3d 1034, 368 N.E.2d 465 (1977) (insurer not liable to injured third party because policy not subject to financial responsibility law making liability absolute after loss, when policy not certified as required by act); *State Farm Mut. Auto. Ins. Co. v. Wall*, 92 N.J. Super. 92, 222 A.2d 282 (1966) (insurer liable to third parties although policy not certified under financial responsibility law, but where director could have demanded such proof).

In other cases the courts have recognized a policy protecting third party rights in the state's overall statutory insurance scheme, compulsory insurance requirements, or statutes precluding certain exclusions in automobile insurance policies. *State Farm Ins v Kurylowicz*, 67 Mich. App. 568, 242 N.W.2d 530 (1976) (court indicated that it was questionable whether an automobile liability policy could ever be rescinded ab initio after accident, in light of legislative enactments which, when read in pari materia, suggested policy that persons suffering loss in traffic accidents have a source of recovery); *Allstate Insurance Co. v. Sullam*, 76 Misc. 2d 87, 349 N.Y.S.2d 550 (1973) (no rescission as to compulsory insurance policy after injury to third party, because purpose of compulsory insurance is to protect travelers on roadways by providing compensation for injury resulting from automobile accident); *Rauch v. American Fam. Ins. Co.*, 115 Wis. 2d 257, 340 N.W.2d 478 (1983) (insurer liable to third party despite insured's misrepresentations, because driver of insured's car at time of accident was member of class precluded by statute from being excluded from coverage under policy; since purpose of statute was to protect innocent third parties, purpose would be frustrated if such third parties were denied compensation because of insured's misrepresentations).

Yet, others have denied third-party recovery on the basis of misrepresentations by the insured without mention of any underlying statutory policy. *Gov't Employees Ins. Co. v. Chavis*, 254 S.C. 507, 176 S.E.2d 131 (1970); *Sentry Indemnity Co. v. Brady*, 153 Ga. App. 168, 264 S.E.2d 702 (1980); *State Farm Mut. Auto. Ins. Co. v. Price*, 181 Ind. App. 258, 396 N.E.2d 134 (1979); *Miller v. Plains Insurance Company*, 409 S.W.2d 770 (Mo. App. 1966).

Nebraska has recently enacted legislation making automobile liability insurance compulsory. See Neb. Rev. Stat. §§ 60-302 (Supp. 1985) and 60-570 (Cum. Supp. 1986).

These enactments might be said to support the argument that Nebraska's statutes evidence a policy of protecting the innocent victims of automobile accidents from financial ruin. However, these provisions did not become operative until January 1, 1986, and, thus, were not in force when the policy in question

was issued nor when the loss occurred. The statutes may not be read retroactively in violation of vested rights under the policy. See *Farm Bureau Ins. Co. v. Adams*, 145 Ind. App. 516, 251 N.E.2d 696 (1969) (cancellation statute may not be interpreted retroactively in violation of vested rights in policy's cancellation clause, which permitted cancellation without reason).

Glockel argues that the policy behind the cancellation statutes, §§ 44-514 to 44-521, requires that the insurer not be permitted to rescind the policy, at least as to an injured third party. Clearly, the policy behind those sections is to provide the insured with notice of cancellation, when that is the remedy utilized by an insurer. *Glockel I.*

It is also clear, however, that this was a "voluntary" policy of insurance which was not issued under the financial responsibility law, a compulsory insurance law, nor an assigned risk plan. Under the Nebraska insurance statutes in effect at the time of the policy's issuance, State Farm's right to rescind was not cut off by injury to a third party.

Although the Nebraska automobile insurance statutes do evidence a policy of seeking to protect the innocent victims of automobile accidents, this policy is not of sufficient magnitude to override an insurer's rescission rights, unless the policy is issued pursuant to a statute enacted to protect such third-party rights. *Reserve Ins. Co. v. Aguilera*, 181 Neb. 605, 150 N.W.2d 114 (1967). Since the policy in the present case was not issued pursuant to such a provision, State Farm retained its right to rescission on the ground of material misrepresentations by the insured.

JUDGMENT ENTERED.

STATE OF NEBRASKA, APPELLEE, V. GREGORY C. LAFLER, APPELLANT.

399 N.W.2d 808

Filed January 23, 1987. No. 86-536.

1. **Criminal Law: Right to Counsel: Words and Phrases.** Indigency, as used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), means the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family.
2. **Criminal Law: Right to Counsel.** In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), a court is to consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.
3. **Constitutional Law: Criminal Law: Due Process: Jury Trials.** The U.S. Constitution, through the due process clause of the 14th amendment, requires the states to provide a trial by jury whenever the 6th amendment would so require if the case were in federal court.
4. **Constitutional Law: Criminal Law: Sentences: Jury Trials.** An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.
5. **Constitutional Law: Jury Trials: Waiver.** A waiver of the constitutional right to a jury trial cannot be presumed from a silent record.
6. **Jury Trials: Waiver.** A demand is required to invoke the statutory right to a jury trial for a petty offense in county court. A failure to file a timely request in accordance with the rules of court constitutes a waiver of the statutory right to a jury trial.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Judgments on counts I, II, and III reversed, and the cause remanded for a new trial on those counts. Judgment on count IV affirmed.

Paul D. Merritt, Jr., of McGinley, Lane, Mueller, O'Donnell, Merritt & Williams, P.C., for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and GRANT, JJ., and CAMP, D.J.

BOSLAUGH, J.

The defendant was convicted of three counts of assault in the third degree and one count of criminal mischief. He was sentenced to 30 days in jail on each of the assault counts, the sentences to run concurrently, and fined $10 on the criminal mischief count.

The charges arose out of a dispute concerning a road in Lorenzo, Nebraska. On April 9, 1984, several men were erecting a fence on the north side of the roadway, away from the traveled portion of the road. Several fenceposts had been installed, and the men were standing near the upright posts when the defendant, who was driving a truck, appeared. The defendant drove directly toward the three men, causing them to scramble out of his way. The defendant then knocked down the posts, breaking a brace post. The defendant was arrested and charged with assault for threatening the men in a menacing manner and criminal mischief for destroying the post.

Upon the first appeal to the district court, the cause was remanded for a hearing to determine whether the defendant was indigent under the standard set out in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985).

Upon remand, the county court found that the defendant was not indigent and had the ability to retain legal counsel without prejudicing his financial ability to provide economic necessities for himself. Upon appeal to the district court the judgments on all of the counts were affirmed.

The defendant has now appealed to this court and contends that the trial court erred in failing to afford him a jury trial and in failing to find that he was entitled to court-appointed counsel.

On April 25, 1984, the defendant appeared in the county court, without counsel. He had filed an affidavit concerning his financial condition and requesting the appointment of counsel. The county court advised the defendant that he had a right to retain counsel of his own choosing but that if he was "an absolute indigent person, poverty stricken, the Court could, upon a proper showing, appoint counsel . . . ." He was further advised that he had a right to a jury trial "if a proper demand" was made.

When the defendant declined to enter any pleas until he had obtained counsel, the county court entered pleas of not guilty to all counts. The court then held an evidentiary hearing on the issue as to whether the defendant was indigent. At the conclusion of the hearing the court refused to appoint counsel for the defendant. After a second hearing, on June 6, 1984, the court again denied the defendant's request for appointed counsel.

Trial was had on June 8, 1984, the defendant appearing pro se. At the close of the evidence the defendant was found guilty and sentenced.

With respect to the defendant's second assignment of error, § 29-1804.04 defines indigent as "the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family."

Neb. Rev. Stat. § 29-1804.05 (Reissue 1979) requires the court to make a "reasonable inquiry to determine [a defendant's] financial condition." *State v. Richter*, 221 Neb. 487, 378 N.W.2d 175 (1985). In determining whether a criminal defendant is indigent as the term is used in § 29-1804.04, the trial court must consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.

In *State v. Radford*, 202 Neb. 440, 441, 276 N.W.2d 82, 83 (1979), the defendant was denied court-appointed counsel, even though his earnings were "about 116 every four days." The defendant was single, had no cash or bank accounts, and owned property consisting of one automobile on which the debt was greater than its value. Although categorizing the case as borderline, this court sustained the county court's finding that without a further showing of inability to obtain counsel, the defendant was not eligible for court-appointed counsel.

The case at bar is similar to *State v. Radford*. The defendant is single, has no dependents, and has some income. Unlike *State v. Radford*, however, the defendant here owns unencumbered real property valued at more than $9,000 and an inventory

valued at approximately $4,500. The trial court made extensive inquiries as to the defendant's assets and liabilities and examined the defendant's affidavit of indigency. This was a reasonable inquiry to determine the defendant's financial ability to obtain counsel.

Although the defendant stated that he had talked with several lawyers who requested retainers of $2,000 to $3,000, no evidence was presented as to what the cost of representation in this case would be. The record, in its present state, supports the findings and fails to show an abuse of discretion in the refusal to appoint counsel.

As to the first assignment of error, the county court was in error in advising the defendant that a demand for a jury trial was required for the assault counts. Assault in the third degree is a Class I misdemeanor, which carries a maximum penalty of imprisonment for 1 year, or a $1,000 fine, or both. Neb. Rev. Stat. § 28-106 (Reissue 1985). It is a "serious" crime for which a jury trial is constitutionally required, unless expressly and intelligently waived by the defendant. *State v. Bishop, ante* p. 522, 399 N.W.2d 271 (1987). A waiver of this right cannot be presumed from a silent record. *State v. Predmore,* 220 Neb. 336, 370 N.W.2d 99 (1985).

The record does not show the defendant waived his right to a jury trial on the assault charges. Instead, the defendant's request for a jury trial was denied solely on the ground the request was not made in a timely or proper manner. Since the record does not show the defendant knowingly and intelligently waived his right to a jury trial on the assault charges, the judgments on counts I, II, and III are reversed and the cause remanded for a new trial on those counts.

The judgment on count IV, a charge of criminal mischief pursuant to Neb. Rev. Stat. § 28-519(4) (Reissue 1985), alleging the defendant damaged property in the amount of $100 or less, is affirmed. This was a petty offense for which the defendant did not have a constitutional right to a jury trial. *State v. Bishop, supra.* The defendant did, however, have a statutory right to a jury trial.

Neb. Rev. Stat. § 24-536 (Reissue 1985) provides that a jury trial in county court may be demanded by either party in any

ordinances and certain traffic infractions. A demand is required to invoke this statutory right. *State v. Vernon*, 218 Neb. 539, 356 N.W.2d 887 (1984). Failing to file a timely request for a jury trial in accordance with the rules of court constitutes waiver of this statutory right.

A request for a jury trial pursuant to § 24-536 may be made orally at the time of arraignment or by written request prior to trial in accordance with the rules of the court. *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980). A defendant who appears pro se must make a proper demand for a statutorily provided jury trial or that right will be deemed to have been waived. *State v. Vernon, supra; State v. Mangelsen*, 207 Neb. 213, 297 N.W.2d 765 (1980).

The defendant was not represented by counsel at the arraignment and elected to proceed without counsel when his request for court-appointed counsel was denied. The failure to make a timely request for a jury trial on count IV constituted a waiver of the right to a jury trial on that charge. The conviction and sentence on that charge are affirmed.

The judgments on counts I, II, and III are reversed and the cause remanded for a new trial on those counts. The judgment on count IV is affirmed.

JUDGMENTS ON COUNTS I, II, AND III REVERSED, AND THE CAUSE REMANDED FOR A NEW TRIAL ON THOSE COUNTS. JUDGMENT ON COUNT IV AFFIRMED.

LEASE NORTHWEST, INC., APPELLEE, V. MARGARET DAVIS, APPELLANT.

400 N.W.2d 220

Filed January 30, 1987. No. 85-519.

1. **Guaranty: Security Interests: Actions.** A guarantee who holds an unconditional guaranty has no obligation to proceed against the security prior to seeking recovery under the guaranty contract.
2. **Pleadings.** An affirmative defense must be specifically pled to be considered.
3. **Contracts: Pleadings.** Matters which seek to avoid a valid contract are

affirmative defenses.

4. **Guaranty: Liability: Pleadings.** The modification of a guaranty of such a nature as would substantially change the liability of the parties is an affirmative defense which must be pled.
5. **Evidence: Words and Phrases.** A demurrer ore tenus is an objection to the receipt of evidence.
6. **Prejudgment Interest.** Prejudgment interest is interest due, pursuant to statute, prior to the rendition of a judgment. In the case of a written instrument, it is allowed on liquidated claims pursuant to the provisions of Neb. Rev. Stat. § 45-104 (Reissue 1984).
7. **Contracts: Interest.** Where the parties have contracted for the payment of a particular lawful rate of interest, such contract controls and the rate thus fixed is recoverable in accordance with the terms of the contract.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Donn E. Davis and Gregory B. Bartels of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Gary L. Dolan and Trev E. Peterson of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The plaintiff-appellee, Lease Northwest, Inc., a corporation, sued the defendant-appellant, Margaret Davis, on her written promise to guaranty the obligations of Davis Distributing Co., Inc. (Davis company), a corporation, and of Thomas Davis. Margaret Davis appeals from the judgment of $131,845 plus prejudgment interest entered against her, and assigns seven errors which present three issues: Whether the trial court erred in (1) preventing her from adducing certain evidence, (2) striking a defense, and (3) granting prejudgment interest. We affirm.

Lease Northwest alleged, in essence, that Margaret Davis guarantied the debts of Thomas Davis to it and of the Davis company to it and its predecessor, NBC Leasing Co., a corporation; that NBC Leasing conveyed all its right, title, and interest in and to the guaranty of Margaret Davis to Lease Northwest; that the Davis company and Thomas Davis failed

to make the payments required of them; and that as a consequence Margaret Davis owed Lease Northwest the aforesaid principal sum plus interest in accordance with the agreed terms.

Margaret Davis generally denied Lease Northwest's allegations and further alleged, insofar as is relevant to the issues presented by her assignments of error, that Lease Northwest and NBC Leasing took a security interest in the Davis company's assets, including an assignment of its accounts receivable; that Lease Northwest "negligently and wrongfully" failed to protect its security interests and "failed to take reasonable action" to collect the Davis company's accounts receivable; and that as a consequence Lease Northwest failed to mitigate its damages.

So far as is relevant to the issues raised by the assignments of error, the trial judge's "pretrial notes" identified Margaret Davis' issue to be "mitigation of damages." The pretrial notes also permitted Margaret Davis to depose Fred Silman, an employee of Lease Northwest, if he could be found.

Lease Northwest adduced evidence that on June 14, 1974, the Davis company entered into a "Master Lease" agreement with NBC Leasing whereunder NBC Leasing purchased equipment from the Davis company and leased the equipment back to the company, which then subleased the equipment to others. The master lease was executed on behalf of the Davis company by Thomas Davis, its president, whose signature was attested by his mother and secretary of the corporation, Margaret Davis. Thomas Davis and his wife, Marilyn, also signed a guaranty, which provides:

> The undersigned guarantors jointly and severally unconditionally guarantee the prompt payment when due of each monthly rental payment due and payable under the foregoing Lease Agreement, and to enforce the liability of guarantors hereunder, Lessor shall not be required, first to (a) give guarantors notice of Lessee's default; (b) repossess the equipment; or (c) attempt to enforce the liability of Lessee under the Lease Agreement. Lessor may from time to time accept late payments of rental and may extend the term of this Lease without

> defeating or diminishing this continuing guaranty. This is a guarantee of payment and not of collection.

Certain sublessees defaulted on their payments owed to the Davis company, which in turn defaulted on the payments it owed to NBC Leasing. As a consequence, on March 1, 1979, NBC Leasing and the Davis company renegotiated their arrangement, and Margaret Davis executed an agreement which identified her as a guarantor and recognized that "the Guarantors have guaranteed payment of all obligations of the Lease," and under which she agreed that all provisions of the master lease not otherwise modified "and any related agreements shall remain in full force and effect," and that guarantors agreed "that the foregoing shall not affect the continuing guaranty of each of them of the Lease, or of [the Davis company's] obligations thereunder."

The Davis company was later dissolved, after which Thomas Davis continued to do business individually as Davis Distributing. Thomas Davis' sublessees continued to experience financial distress, and in July or August of 1980 "Thomas Davis, d/b/a Davis Distributing Company" filed for some type of relief under the provisions of the federal bankruptcy act.

In October of 1980 NBC Leasing sold and assigned its lease portfolio to Lease Northwest. On January 13, 1981, Lease Northwest negotiated a new agreement which allowed Thomas Davis to defer a portion of each monthly payment due Lease Northwest, and obligated him to pay interest at the rate of 16 percent per annum "from and after the due date of each deferred amount until paid." A representative of Lease Northwest testified that it would not have restructured Thomas Davis' debt without the signature of Margaret Davis as a continuing guarantor, even though Lease Northwest continued to hold a mortgage lien against real property and acquired a security interest in all of Thomas Davis' accounts receivable and general intangibles, and notwithstanding the fact that ownership of the equipment purchased from and leased back to the Davis company remained with either Lease Northwest or NBC Leasing. Lease Northwest was so insistent upon Margaret Davis' guaranty that it refused to apply to Thomas Davis' debt

two payments, totaling $8,715, until after May 7, 1981, when Margaret Davis signed an "Acknowledgement" to the January 13, 1981, agreement between it and Thomas Davis. The acknowledgment provides:

> The undersigned, respective Guarantors of all of the obligations of the Lessee under the terms of the Lease Agreements, hereby acknowledge the execution of the foregoing Agreement, and of the Master Lease, and agree that such execution shall not alter or affect their continuing guarantee of said obligations, and, in addition, said guarantee shall apply to all obligations of the Debtor [Thomas Davis doing business as Davis Distributing] set forth herein and in said Master Lease.

The principal amount due Lease Northwest from Thomas Davis under the provisions of the 1981 agreement is established to be $131,845.

After Lease Northwest rested, Margaret Davis attempted to prove certain conversations had between Thomas Davis and Fred Silman. At this point Lease Northwest moved in limine for an order prohibiting the introduction of any evidence relating to any agreement by Lease Northwest to collect the accounts receivable or repossess any property and demurred ore tenus to the mitigation of damages defense. The trial court sustained the motion and demurrer ore tenus and struck the mitigation of damages defense.

Thereafter, Margaret Davis, outside the presence of the jury, offered to prove that in the spring of 1982 Lease Northwest, through its employee, Fred Silman, instructed Thomas Davis not to attempt to collect any accounts receivable or take possession of the leased property, as Lease Northwest was a tough, experienced, and successful collector and would undertake those efforts. As a result, she understood that Lease Northwest would gather all of the leased equipment, collect all of the accounts receivable, and apply the proceeds to the debt, and, therefore, neither she nor Thomas Davis attempted to make any effort to recover any of the security. Thus, when the sublessees called Thomas Davis about their bills, he told them to wait until they heard from Lease Northwest. Lease Northwest in fact did nothing, and, as a consequence,

$166,366.27 worth of security was lost.

After objections to the foregoing offers were sustained, the trial court sustained Lease Northwest's motion for a directed verdict.

At a subsequent hearing the trial court awarded Lease Northwest "prejudgment interest from and after December 30, 1982 [the date Lease Northwest's petition was filed], at the statutory rate pursuant to Section 45-104, Revised Statutes of Nebraska, as amended."

In arguing the first issue, that the trial court erred in preventing her from adducing certain evidence, and the second issue, that the trial court erred in striking her mitigation of damages defense, Margaret Davis urges that even under an unconditional guaranty Lease Northwest would have had the ordinary contractual duty to mitigate its damages, but that, in any event, the original terms of the guaranty were modified such as to render it conditional and thus obligate Lease Northwest to mitigage its damages. She does not contend that she did not become a party to the 1974 guaranty or that the guaranty as written is other than unconditional.

Whatever may be the general contract mitigation of damages rule, it does not answer the question of whether the holder of an unconditional guaranty has a duty to realize on its security before seeking recovery from the guarantor. *Home Savings Bank v. Shallenberger*, 95 Neb. 593, 146 N.W. 993 (1914), *on appeal after remand* 82 Neb. 507, 118 N.W. 76 (1908), and *aff'd after retrial* 100 Neb. 113, 158 N.W. 455 (1916), presented a suit on an unconditional guaranty in connection with which the guarantee bank had permitted a lien on cattle securing the loan to expire, thus destroying the guarantor's subrogation rights. In remanding the cause for a new trial, the *Shallenberger* court stated that the trial court erred in failing to instruct the jury that the bank's negligence or failure to collect on its security was not a defense available to the guarantor. *First State Bank v. Peterson*, 205 Neb. 814, 290 N.W.2d 634 (1980), held that notwithstanding the provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980), the failure to notify the guarantor of the sale of collateral was not a defense to the suit on the guaranty. In reaching its decision the *Peterson* court relied both on the

Shallenberger rule and on the fact that no security was contemplated or taken at the time the unconditional guaranty was given. Thus, a guarantee who holds an unconditional guaranty has no obligation to proceed against the security prior to seeking recovery under the guaranty contract. Margaret Davis' citations to conditional guaranty cases are inapposite, as is her citation to Neb. U.C.C. § 9-502(2) (Reissue 1980), for her liability is not based on Lease Northwest's security interest in any property.

However, this court discharged an unconditional guarantor to the extent she was damaged by her reliance on statements made by the guarantee after the guaranty contract came into existence. *McAllister v. Pitts*, 58 Neb. 424, 78 N.W. 711 (1899).

Lease Northwest argues, however, that the modification of a guaranty is an affirmative defense. Such a defense must be specifically pled to be considered. *Columbus Bank & Trust Co. v. High Country Stable*, 202 Neb. 724, 277 N.W.2d 81 (1979); *Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co.*, 195 Neb. 658, 240 N.W.2d 28 (1976). Thus, the questions become whether the modification of a guaranty is an affirmative defense and, if so, whether the allegations of Margaret Davis' answer plead the defense.

Columbus Bank & Trust Co. v. High Country Stable, supra, suggests that matters which would controvert the plaintiff's allegations of the amount due under a promissory note and guaranty are affirmative defenses. More specifically, it has been said that matters which seek to avoid a valid contract are affirmative defenses. *Honey v. Barnes Hosp.*, 708 S.W.2d 686 (Mo. App. 1986).

Thus, the modification of a guaranty of such a nature as would substantially change the liability of the parties, as is the situation claimed in the present case, is an affirmative defense which must be pled.

Margaret Davis argues that the allegations of her answer, particularly when coupled with the pretrial notes permitting her to depose Fred Silman, plead a modification defense with sufficient adequacy to survive the challenges presented by Lease Northwest's demurrer ore tenus and motion in limine.

In so arguing, she relies on *Newman Grove Creamery Co. v.*

Deaver, 208 Neb. 178, 302 N.W.2d 697 (1981), a suit on a promissory note in which the answer alleged duress as a defense. After the plaintiff therein rested, it demurred ore tenus to defendants' answer on the ground it alleged no facts to support the conclusion that duress had been present in the execution of the note. In overruling the sustainment of that demurrer, this court recognized a demurrer ore tenus as an objection to the receipt of evidence, but concluded that the defect in the answer did not prejudice the plaintiff. In its discussion the court noted that the pretrial order required that motions be filed 10 days before trial and observed that pretrial conferences are held to simplify the issues and that, to avoid traps and surprises, counsel cannot sit idly by and then for the first time interpose objections at trial. Notwithstanding those reflections, however, the *Newman Grove* court expressed doubt that the pretrial order covered a demurrer ore tenus. Thus, the court's decision rested on the fact that while the defendants pled no facts, their answer nonetheless put plaintiff on notice that duress was an issue and therefore fulfilled its purpose as a pleading: to frame and limit the issues upon which a cause is to be tried. *Circle 76 Fertilizer v. Nelsen*, 219 Neb. 661, 365 N.W.2d 460 (1985).

Thus, the controlling inquiry is whether it can reasonably be said that alleging a negligent or wrongful failure on the part of Lease Northwest to collect accounts receivable and protect its other security interests pleads a modification of the guaranty. It cannot be so said, even taking into account that the timing of the objection to the modification evidence requires that Margaret Davis' answer be liberally construed. *Newman Grove Creamery Co. v. Deaver, supra*. There is nothing in her answer which suggests that Margaret Davis claims the original terms of the guaranty were altered by any statements made by Lease Northwest after the guaranty came into existence. The allegations relate to Lease Northwest's perceived but nonexistent contractual duty to mitigate its damages by first recovering from its security. The fact that Margaret Davis was granted permission to depose Fred Silman, from whom no deposition was offered, does not alter that fact, whatever it might have been assumed he would say.

The crucial distinction between *Newman Grove* and the present case is that in the former the duress defense was pled, although improperly so by conclusion rather than by facts. *Moore v. Puget Sound Plywood*, 214 Neb. 14, 332 N.W.2d 212 (1983). In the present case the answer makes no reference whatsoever to the modification defense. The failure of the *Newman Grove* plaintiff to move for a more definite and certain statement of the defense waived its right to later object to the reception of evidence relevant to the duress issue. There can, however, be no waiver of the right to object to evidence relevant to a defense not pled in any form.

We must therefore conclude that the trial court correctly sustained Lease Northwest's demurrer ore tenus and motion in limine and properly struck Margaret Davis' mitigation of damages defense. The first and second issues must therefore be resolved adversely to Margaret Davis.

That being so, reasonable minds could draw but one conclusion from the evidence, that Lease Northwest was entitled to recover, and the trial court thus properly resolved the controversy as a matter of law. *Vice v. Darm Corp., ante* p. 1, 395 N.W.2d 524 (1986).

In connection with the third and last issue, that the trial court erred in allowing prejudgment interest, Lease Northwest correctly points out that the question is properly one concerning contractual, not prejudgment, interest. Prejudgment interest is interest due, pursuant to statute, prior to the rendition of a judgment. In the case of a written instrument, it is allowed on liquidated claims pursuant to the provisions of Neb. Rev. Stat. § 45-104 (Reissue 1984). However, where the parties have contracted for the payment of a particular lawful rate of interest, such contract controls and the rate thus fixed is recoverable in accordance with the terms of the contract. *First Nat. Bank v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533 (1985).

In the present case Thomas Davis obligated himself, under the 1981 agreement, to pay interest at the rate of 16 percent per annum. Margaret Davis, by guarantying Thomas Davis' debts, contractually obligated herself to pay the aforesaid lawful rate of interest. The trial court misperceived the issue and only

awarded interest at the rate of 12 percent from and after the filing of Lease Northwest's petition, rather than 16 percent in accordance with the terms of the agreement Margaret Davis guarantied. However, since Lease Northwest did not cross-appeal, the trial court's judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF D.R. AND A.D., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLANT, V. A.D. AND L.D., APPELLEES.
399 N.W.2d 812

Filed January 30, 1987. No. 85-761.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Steven J. Moeller and Mark J. Young, Deputy Hall County Attorneys, for appellant.

Thomas A. Wagoner, for appellee A.D.

John B. McDermott of McDermott, Depue & Zitterkopf, guardian ad litem.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This appeal involves the question of whether parental rights to two minor children should be terminated. The county court for Hall County, Nebraska, terminated the parental rights. On appeal to the district court, the order of the county court terminating the rights of the natural mother was affirmed, but the order terminating the parental rights of the father was reversed and the matter was remanded to the county court for further proceedings. We have reviewed the matter now on appeal and conclude that the order of the district court should be affirmed.

For that reason the judgment of the district court reversing the judgment of the county court is affirmed.

AFFIRMED.

PONDEROSA VILLA, CITY OF CRAWFORD, APPELLEE, V. IRENE HUGHES, APPELLANT, RONALD E. SORENSEN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEE.

399 N.W.2d 813

Filed January 30, 1987. No. 86-175.

1. **Employment Security Law.** Neb. Rev. Stat. § 48-627 (Cum. Supp. 1986) describes the weekly requirements for continuing to be eligible for unemployment compensation benefits. It is not concerned with reasons why a claimant became unemployed or with threshold questions of eligibility.
2. _____. The result of finding a claimant "unavailable for work" under Neb. Rev. Stat. § 48-627(c) (Cum. Supp. 1986) is to disqualify the claimant from unemployment benefits only for the week he or she was unavailable.
3. _____. Neb. Rev. Stat. § 48-628(c) (Cum. Supp. 1986) applies when an unemployed person refuses an offer of suitable work and chooses to remain unemployed, and is not applicable when an employed person voluntarily leaves over a change in working conditions.
4. **Employment Security Law: Good Cause.** The correct inquiry when an employed person refuses a demotion and leaves is whether good cause existed to voluntarily sever the employment relationship. Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986).
5. **Employment Security Law: Appeal and Error.** In appeals under Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986), we review the causes de novo on the record, retry the issues of fact, and come to independent conclusions regarding the findings challenged.
6. **Employment Security Law: Proof: Good Cause.** To avoid disqualification under Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986), the employee who voluntarily severed the employment relationship has the burden of proving that the leaving was with good cause.
7. **Employment Security Law: Good Cause.** Where the terms of a demotion, not the result of employee misconduct, substantially changed almost every aspect of an employee's job to her detriment, good cause existed to leave.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Reversed.

Terry Curtiss of Curtiss, Moravek, Danehey & Curtiss, P.C., for appellant.

H.W. Snyder, for appellee Ponderosa Villa.

Laureen Van Norman, for appellee Sorensen.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

Irene Hughes, the claimant, appeals from the decision of the district court for Dawes County reversing the Nebraska Appeal Tribunal and denying Hughes unemployment compensation benefits. We reverse.

Hughes, a licensed practical nurse, was health service supervisor of nursing services (HSS) at Ponderosa Villa nursing home at the time the Legislature passed 1985 Neb. Laws, L.B. 253. The bill changed Neb. Rev. Stat. § 71-2017.01(11) (Reissue 1986) to require that the position of supervisor be held by a registered nurse. As a result Hughes was no longer qualified for her job as HSS.

On May 16, 1985, Dixie Moody, administrator for Ponderosa Villa, informed Hughes of the legislative change and offered to demote her to a position as a staff nurse, full time, on a "4-2" schedule. This was the same position she held prior to her promotion to HSS. On July 26, 1985, Hughes resigned.

Hughes applied for benefits with the Department of Labor's division of employment on August 20, 1985. On August 27 the Department of Labor notified her that she was eligible for benefits and that "it is determined this leaving was with good cause." Ponderosa Villa, City of Crawford, appealed to the Nebraska Appeal Tribunal. The notice of hearing before the tribunal stated: "NOTICE IS HEREBY GIVEN that a hearing will be held on the issue(s) marked below . . . . Whether the claimant voluntarily left his/her employment without good cause or was discharged for misconduct connected with his/her work." After the hearing the Nebraska Appeal Tribunal affirmed the decision of the claims deputy, finding that Hughes left her job with good cause.

Ponderosa Villa appealed the decision of the Nebraska Appeal Tribunal to the district court for Dawes County. The

district court reversed, setting forth its findings and rationale as follows:

> The Court being fully advised in the premises finds that the legislature made it mandatory that Claimant-Respondent is not qualified for her most recent job with Employer-Appellant or for any similar position. She is qualified for the job she previously held with Employer-Appellant, which is materially the same job she was offered after her disqualification. There is no evidence that the employment offered was not on as good terms as could be expected for the profession in that place at that time. She was not entitled to refuse the offer of employment and she is and was, from the time of her refusal, unavailable for work.

The appellant sets forth two assignments of error. The first is that the court erred in finding the appellant "unavailable for work," and second, that it incorrectly disqualified the appellant from benefits, in that the appeal tribunal was correct in determining that the appellant left voluntarily, but with good cause. We find merit in both assignments of error and reverse the district court's decision.

Although no express reference to statutory authority for the disqualification of Hughes was made, the language the district court used in the formulation of its findings seems to intimate that Hughes failed to meet the qualifications spelled out in either Neb. Rev. Stat. § 48-627(c) (Cum. Supp. 1986) or Neb. Rev. Stat. § 48-628(c) (Cum. Supp. 1986).

The district court specifically found Hughes to be "unavailable for work" and therefore to be ineligible for benefits absolutely. Section 48-627(c) requires the employee to be found to be available for work in order to be eligible for benefits for any given week. The result of being "unavailable for work" is to make the unemployed individual ineligible for benefits for the week in which he or she is unavailable. This statute clearly was incorrectly applied to the case at hand for two reasons. First, § 48-627 does not address the reasons why a person became unemployed, nor is it concerned with the threshold questions of eligibility. Section 48-627 describes the weekly requirements for continuing to be eligible for benefits.

See *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985). After a person becomes unemployed, he or she must remain able to work to receive benefits. *Heimsoth v. Kellwood Co.*, 211 Neb. 167, 318 N.W.2d 1 (1982). In the case before us we are concerned only with whether Hughes left her job with or without good cause, not whether she was unavailable for work in any certain week after becoming unemployed. Second, the result of finding a claimant "unavailable for work" is to disqualify the claimant only for the week in which he or she was unavailable. The district court decided an issue not before it, and any decision thereon was void.

The district court also found that Hughes was not entitled to refuse the offer of employment because she failed to prove the job "was not on as good terms as could be expected for the profession in that place at that time." Such proof is relevant when the claimant may be disqualified under § 48-628(c). This section disqualifies persons refusing "suitable" employment. Under § 48-628(c), whether work is "suitable" or not is determined by looking at such things as training, experience, past earnings, and prospects for work in one's customary occupation. However, § 48-628(c) does not apply to someone when the refusal of a change in position results in a voluntary leaving. In *Norman v. Sorensen*, 220 Neb. 408, 370 N.W.2d 147 (1985), the claimant was transferred to another position. Her duties were altered, although her salary remained the same. The claimant quit and attempted to argue that the quit should be characterized as refusing an offer of unsuitable work under § 48-628(c). We rejected that argument, explaining that subsection (c) "states an additional reason for disqualification from benefits when an *unemployed* person refuses an offer of 'suitable' work and chooses to remain unemployed." (Emphasis supplied.) 220 Neb. at 412, 370 N.W.2d at 150. The claimant was determined to have left without good cause and therefore was disqualified under § 48-628(a)(1).

In this case Hughes was an employed person who refused a demotion and left. The correct inquiry for the district court was whether the leaving was with or without good cause. § 48-628(a)(1). The district court's finding that the claimant failed to prove the terms of the offer unsuitable misconceived

the issue.

In appeals under § 48-628(a)(1), we review the causes de novo on the record, retry the issues of fact, and come to independent conclusions regarding the findings challenged. *Stackley v. State*, 222 Neb. 767, 386 N.W.2d 884 (1986). To avoid disqualification under § 48-628(a)(1), the employee who voluntarily severed the employment relationship has the burden of proving that the leaving was with good cause. *Id.* We find that Hughes proved that she had good cause to quit and is eligible for benefits.

The demotion, if accepted, would have changed to Hughes' disadvantage almost every aspect of her employment. As HSS, Hughes received a monthly salary of $1,168, had a 5-day workweek, had 50 to 90 percent of her weekends off, and had holidays off unless needed. Her demotion to a staff nurse would have resulted in a wage cut to $5.90 per hour and, due to a 4-2 schedule, a decrease in the average number of hours worked per week, resulting in a substantial reduction of her earnings. The "4-days on, 2-days off" work schedule would result in Hughes' having only one weekend off (Saturday and Sunday off) every 7 weeks, as opposed to having the majority of her weekends off as HSS. Ponderosa Villa refused to negotiate alternative scheduling. Her duties would be reduced; she, who once held the position of supervisor, would now join the ranks of those she previously supervised. She would lose her paid holidays. All of these changes are related to employment conditions and are not personal in nature. See, *Stackley v. State, supra; Glionna v. Chizek*, 204 Neb. 37, 281 N.W.2d 220 (1979).

All of the changes resulting from the demotion, when taken together, are clearly not trivial. They are tangible and substantial and constitute good cause for Hughes to sever her employment with Ponderosa Villa.

Having found good cause, we determine that the disqualification under § 48-628(a)(1) does not apply, nor does any other disqualification apply. The decision of the district court is reversed.

REVERSED.

CAPORALE, J., concurring in part, and in part dissenting.

I agree that whether Hughes is available for work is not an issue. I must, however, dissent from that part of the opinion which concludes that Hughes did not leave her work "voluntarily without good cause" as contemplated by Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986). I would factually find that one who must be demoted because of legislative action and who refuses to accept the best job available for which she is qualified does not have good cause to terminate her employment.

BOSLAUGH, J., joins in this concurrence and dissent.

TIMOTHY W. TURNER AND JEANNIE L. TURNER, APPELLANTS AND CROSS-APPELLEES, V. RODNEY ALBERTS, APPELLEE AND CROSS-APPELLANT.

399 N.W.2d 817

Filed January 30, 1987. No. 86-184.

1. **Breach of Contract: Real Estate: Damages.** The general measure of damages for a breach of contract to convey land is the difference between the market value of the land at the time of the breach and the price set out in the contract.
2. _____: _____: _____. The exception to the general rule is that where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded with directions.

John F. Simmons of Wright, Simmons & Selzer, for appellants.

Richard A. Douglas of Winner, Nichols, Douglas, Kelly and Arfmann, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

This is an appeal from an order of the district court for Scotts Bluff County affirming the judgment of the county court. Plaintiffs-appellants, Timothy W. and Jeannie L. Turner, husband and wife (hereinafter collectively referred to as Turner), brought an action in county court seeking damages of $8,741.10 in connection with the sale of their residence to defendant-appellee, Rodney Alberts. After a trial to the court, the county judge found for Turner and awarded damages of $1,716.62. Turner appealed to the district court, where the judgment and amount of damages were affirmed. Turner timely appealed to this court, and Alberts has cross-appealed.

Turner assigns as error the action of the trial court, affirmed by the district court, in failing to allow certain late charges as damages and in determining the evidence did not permit the court to ascertain which portion of the mortgage payments made by Turner after Alberts defaulted constituted recoverable damages. Alberts, in his cross-appeal, assigns as error the action of the district court in affirming the county court's judgment, which failed to find that Turner's exercise of a forfeiture right was an exclusive right, thereby precluding an action for damages. For reasons hereinafter stated, the order of the district court is reversed.

Evidence adduced at trial reveals the following. On August 20, 1981, Turner and Alberts entered into a written agreement under which Turner agreed to sell the Turner residence to Alberts for the sum of $65,000. No real estate agent was engaged in connection with this contract. The contract called for a downpayment in the amount of $4,000, due at the time of execution of the contract. The remaining balance was to be paid in 36 monthly installments equaling Turner's monthly mortgage payments, including escrow payments for taxes and insurance, plus a balloon payment on September 1, 1984, of "the entire remaining principal balance, with accumulated interest . . . ." The contract also contained a forfeiture clause, which provided that in the event Alberts failed to make the monthly payment within 7 days of the date when it was due, Turner would be entitled to declare a forfeiture of the Alberts interest in the property, and a further clause stating, "In addition to the rights

specified hereunder, TURNER shall have all other rights allowable in law or equity."

Pursuant to the contract, at the time of conveyance Turner delivered to the escrow agent a warranty deed conveying the property from Turner to Alberts, and at the same time Alberts delivered to the agent a quitclaim deed which would reconvey the property to Turner in the event Alberts did not make the payments due and Turner declared a forfeiture. The contract further provided, "All payments made by ALBERTS under this contract under such circumstances shall be considered as rent of the property and shall not be refunded to him [Alberts]."

Alberts made the $4,000 downpayment as called for in the contract and took possession of the residence. Payments for the months of September 1981 through March 1982 were made without incident. In late March of 1982, Alberts was notified by Turner that his monthly payment would be increasing due to an increase in insurance premiums. Shortly thereafter, on April 7, 1982, Alberts decided to move out of the house. At this time the Turners were living in Omaha, Nebraska. Mrs. Turner was visiting Scottsbluff when she heard Alberts was leaving the house. When Mrs. Turner questioned Alberts concerning leaving the house, he replied, "I'm moving. I'm gonna let the house — I'm just gonna let it go." Alberts moved from the residence without making the April 1982 payment.

On April 13, 1982, after the 7-day deadline of the forfeiture provision had passed, Turner sent a letter to the escrow agent notifying it of their intention to declare a forfeiture. The letter read in part, "This letter is notice to you that we have elected to declare such a forfeiture." The letter also demanded that the escrow agent deliver both deeds to Turner's attorney pursuant to the declaration of a forfeiture. The deeds were returned to the attorney.

Turner resumed making the monthly payment to the mortgage holder. The April, May, June, and July 1982 payments were made promptly. Turner failed to make the August, September, and October payments until the house was resold in November of 1982. In addition, as a result of these payments' being late, penalty charges were assessed Turner.

The house was resold in November of 1982, for $65,500. In addition to resuming the monthly payments, Turner paid the utilities during the interval before resale, as well as certain repair charges which Turner alleged were required because of damages Alberts caused to the house.

After the resale, Turner brought this action in county court alleging that damages of $12,741.10 had occurred as a result of Alberts' not completing the purchase. That sum included the real estate commission on the resale, mortgage payments, late charges on mortgage payments, electricity and water bills, real estate taxes, additional interest, telephone bills, a telegram, "House Clean Up," and "Labor and Materials in Clean Up." Turner also pled that Alberts was "entitled to a credit for the $4,000.00 down payment which the Defendant made and which the Plaintiffs retained," and prayed for $8,741.10 as damages. Alberts answered by a general denial and the affirmative defense that Turner had waived any right to recover damages by electing "to utilize the quitclaim deed held in escrow."

After trial, the county court found for Turner and allowed as damages the repair and labor costs, realtor's fees and title insurance incurred in the resale, utility costs, and additional interest, totaling $6,216.62. Damages for the mortgage payments were denied, with the court reasoning that it was not properly shown what part of the mortgage payments constituted recoverable interest payments versus nonrecoverable reduction on principal. After the court calculated the damages, the court applied the credits of $4,000 for the downpayment (as pled by Turner) and $500 "for the reason that Plaintiff resold the property for $65,500," and entered judgment for Turner in the amount of $1,716.62. Turner appealed to the district court for Scotts Bluff County, where the decision of the county court was affirmed.

The general measure of damages for a breach of contract to convey land is the difference between the market value of the land at the time of the breach and the price set out in the contract. *Kerrey Constr. Co. v. Hunt*, 213 Neb. 776, 331 N.W.2d 519 (1983); *Hahn v. International Management Services, Inc.*, 207 Neb. 229, 298 N.W.2d 140 (1980); *Oman v. City of Wayne*, 152 Neb. 341, 40 N.W.2d 916 (1950). That

general rule, as shown by the cited cases, applies to situations where either the vendor or the vendee seeks damages after a breach.

In *Kerrey Constr. Co. v. Hunt, supra*, a case in which the vendee sought damages after the vendors' breach, an exception to that general rule was stated at 780-81, 331 N.W.2d at 521: "The exception to this rule is that where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made." We hold that that exception to the general rule should also apply to cases where the vendor seeks damages after a vendee's breach, such as in this case.

Applying the rules, however, in the case at bar results in some difficulty. If the general rule is to be applied, Turner is entitled to no damages. Turner did not plead nor was there any direct evidence offered as to the value of the property at the time of Alberts' breach of contract. The evidence showed, however, and the court found, that the property was sold 7 months after the breach, for an amount $500 in excess of the contract price. It is clear that application of the general rule would not result in the award of any damages to the plaintiff.

Application of the exception to the general rule avails Turner little more. Plaintiff did not prove that the special damages sought could "fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made." The contract itself, however, shows that responsibility for repairs to the house was that of Alberts, and therefore, clearly, damages for repairs were in the contemplation of the parties. In that connection, the contract provided, in § 6 thereof:

> ALBERTS will keep the premises in good condition, will make all repairs seasonable, and will undertake no action which will create a lien upon the premises. ALBERTS will make no structural modifications to the premises without the prior written consent of TURNER. The parties recite that the house located on the premises contains radiant heat in the ceiling and that any fixtures attached to the ceiling might cause damage to the house.

The trial court found that the costs of repair were $586.34. The evidence clearly supports that amount, and it was properly allowed to Turner as damages.

With regard to the other damages allowed, as stated above, there was no evidence that such damages were in the contemplation of the parties when the contract was signed. Instead, the contract set out a precise method whereby Turner would legally obtain Alberts' quitclaim deed and thus return Turner to the position of owner of the premises and remove the claim of Alberts to the property. The contract required that Alberts, in the event of any failure to make the required payments and at the demand of Turner, would "peaceably vacate the premises immediately." Alberts did so. At that point, Turner had title to, and possession of, the house. It was Turner's to do with as they wished. In the absence of any other showing, Alberts had no right in the premises and no obligation other than that imposed on him by the contract between the parties. Under the facts as pled and proved by plaintiffs, the evidence not only does not support any additional damages for Turner on this appeal but shows directly that since Turner has pled that Alberts is entitled to a credit for his $4,000 downpayment, Turner is certainly not entitled to any further damages from Alberts in this lawsuit. The judgment for an additional $1,716.62 in Turner's favor must be set aside.

Alberts, at the trial of this matter, testified, with regard to his $4,000 downpayment, that he was agreeable to forfeiting that amount "as a liquidated damage." His pleadings supported that approach, and he sought the disposition of the case on that basis. Since the case is disposed of in the manner which Alberts sought, we need not determine the issues presented by Alberts' cross-appeal, which seeks the same result.

The cause is remanded to the district court with directions to return the case to the county court, where judgment should be entered for defendant Alberts on Turner's amended petition. Costs are taxed to appellants Turner.

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. ROSEY KENNY, ALSO KNOWN AS ROSEY KENNEY, ALSO KNOWN AS JIM KENNEY, ALSO KNOWN AS JAMES KENNEY, APPELLANT.

399 N.W.2d 821

Filed January 30, 1987. No. 86-185.

1. **Constitutional Law: Search and Seizure.** Fourth amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.
2. _____: _____. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his fourth amendment rights infringed.
3. **Rules of Evidence: Other Acts.** It is well established that Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is an inclusionary rule permitting the use of relevant other crimes, wrongs, or acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character.
4. **Sentences: Appeal and Error.** A sentence which is within the range of the statute will not be disturbed, absent an abuse of discretion.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Steven J. Reisdorff of The Law Office, P.C., for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

The appellant, Rosey Kenny, also known as Rosey Kenney, also known as Jim Kenney, also known as James Kenney, was charged by information in the district court for Saline County, Nebraska, with possession of a controlled substance other than marijuana, to wit: lysergic acid diethylamide (LSD), schedule I, in violation of Neb. Rev. Stat. § 28-416(3) (Reissue 1985). This is a Class IV felony, punishable by imprisonment of up to 5 years, or a fine of $10,000, or both imprisonment and fine. Following trial to a jury, Kenny was found guilty. Thereafter, the district court sentenced Kenny to incarceration in the Nebraska Penal and Correctional Complex for a term of not to exceed 3 years. It is from this conviction and sentence which he

now appeals.

While Kenny enumerates four assignments of error, in fact there are but three. The assignments of error are: (1) The court erred in overruling Kenny's motions to suppress; (2) The court erred in admitting, over objection, testimony concerning prior bad acts of Kenny; and (3) The sentence was excessive. We have reviewed the record in light of these assignments of error and find that they are without merit. For that reason the conviction and sentence are affirmed.

The record discloses that on September 9, 1985, a search warrant was issued authorizing Saline County authorities to seize a brown manila envelope which was addressed to Kenny and expected to arrive at the Dorchester, Nebraska, post office on that day, and to search the person who attempted to pick up the envelope. Pursuant to the search warrant, Saline County Sheriff Byron Buzek located himself at the rear of the post office where he could observe the post office boxes, including the box issued to Kenny. At approximately 2:30 p.m., Kenny arrived at the post office, removed the envelope, and walked out. As he walked across the street to a filling station, he threw the unopened envelope into an automobile. The sheriff followed Kenny into the filling station and arrested him.

The envelope was taken, pursuant to the warrant, and subsequently opened by Sgt. Vincent Brehm of the Saline County sheriff's office. Sergeant Brehm found inside two small plastic bags containing off-white paper with pictures of flowers on it, sectioned into 200 squares approximately one-fourth inch by one-fourth inch. The contents of the envelope were later tested by the Nebraska State Patrol laboratory and determined to consist of LSD.

Kenny's contention with regard to his first assignment of error is that the search warrant was obtained as the result of an earlier illegal search and seizure of a third person in California, and therefore, while the information contained in the affidavit used to obtain the search warrant was correct, it was the "fruit of a poisonous tree."

The record establishes that on July 5, 1985, an officer of the Santa Cruz County narcotics unit in Santa Cruz, California, seized property belonging to a Joe Hurley. Included in that

material seized was a letter from the appellant, ordering illicit drugs. It was as a result of this letter that the mail of Kenny was watched until a 9 1/4-inch by 6 3/4-inch brown envelope was mailed by Hurley to Kenny. The case against Hurley was dismissed by the California court, in part because the particular letter sent by Kenny to Hurley was held to be inadmissible as against Hurley. The letter, however, was received in evidence in the instant case, and Kenny's motion to suppress the letter and its envelope was denied. Officer Otis Pogue, a criminal investigator with the Santa Cruz County, California, district attorney's office, testified that on the afternoon of July 5, 1985, he arrested Hurley. He further testified that the letter and envelope, postmarked June 21, 1985, from Kenny, were in Hurley's possession at the time of his arrest. Pogue testified that he mailed the letter and envelope to Sheriff Buzek.

Kenny's claim that *his* fourth amendment rights were violated is simply misplaced. Kenny had no fourth amendment rights in the letter in Hurley's possession. To begin with, it has long been the rule that fourth amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. In *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978), the U.S. Supreme Court was asked to hold that evidence seized by police during the search of an automobile in which the petitioner was a passenger but not an owner should be suppressed on the basis of the petitioner's fourth amendment rights. In rejecting that argument, the U.S. Supreme Court said in *Rakas, supra* at 133-34:

> We decline to extend the rule of standing in Fourth Amendment cases in the manner suggested by petitioners. . . . A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed.

This view is wholly consistent with the earlier view expressed by the U.S. Supreme Court in the case of *Alderman v. United States*, 394 U.S. 165, 174, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969), wherein it was said: "We adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which,

like some other constitutional rights, may not be vicariously asserted."

Nor can Kenny contend that he had any expectation of privacy in letters which he posted in a public mailbox and sent through the mail, thereby losing complete control. In the case of *Ray v. United States Dept. of Justice*, 658 F.2d 608, 610-11 (8th Cir. 1981), the U.S. Court of Appeals for the Eighth Circuit, in discussing the question as to whether one had an expectation of privacy in a posted letter, said:

> The district court, relying on *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), held that Ray lacked standing to raise a Fourth Amendment claim for damages because the search and seizure involved the property and premises of another, Jerry Ray. *Ray v. United States Department of Justice, supra*, 508 F.Supp. at 726. The district court apparently concluded that James' letters to Jerry Ray became Jerry's property upon receipt and that James accordingly lost any expectations of privacy that he had in the letters. *Id.*

The court then went on to say, further, at 611:

> Although not cited by the district court, *United States v. Hubbard*, 493 F.Supp. 209 (D.D.C.1979), supports its conclusion. *Hubbard* involved the attempts of criminal defendants to suppress evidence, but its analysis of Fourth Amendment standing seems equally relevant here. *Hubbard* states that the test for Fourth Amendment standing is whether an individual, based on the facts and circumstances presented by that individual, has a legitimate expectation of privacy in the invaded place. *Id.* at 213-214 (citing *Rakas v. Illinois, supra*). Significantly for this appeal, the district court in *Hubbard* was "unable to understand how *sending* letters to a third party would form a basis for a legitimate expectation of privacy after their delivery. The reasonableness of one's privacy expectations would certainly be undermined by the act of relinquishing control." [Citation omitted.]

The reasoning of both the *Ray* decision, *supra*, and *United States v. Hubbard*, 493 F. Supp. 209 (D.D.C. 1979), appears to us to be valid and conclusive of the question raised here. Once

Kenny placed the letter in the mail, he lost control over the letter. He had no way of knowing who else might see the letter or what the recipient of the letter might do with it, once received. He may have hoped for privacy, but he had no "expectation of privacy" as contemplated by the fourth amendment to the U.S. Constitution. Having relinquished physical control over both the letter and the recipient, the most Kenny may have had were "high hopes." "High hopes" do not, however, constitute a "reasonable expectation of privacy." Having, therefore, no reasonable expectation of privacy and no independent fourth amendment rights in the mailed letter, he acquired no standing to claim a fourth amendment violation with regard to the illegal search and seizure of Hurley's premises. The letter therefore was properly used as the basis of the search warrant and properly received in evidence at Kenny's trial.

Kenny's second contention is that the court erred in permitting the introduction of the letter of June 21, 1985, as evidence of "prior bad acts." Brief for Appellant at 13. He argues that in order for the letter to have been introduced in evidence it must show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. He cites to us in support of his position that the letter was not relevant the case of *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983). We believe that Kenny is in error in his interpretation of that case.

The provisions of Neb. Rev. Stat. § 27-404(2) (Reissue 1985) are not exclusive. While first providing that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person, the act then provides: "It may, however, be admissible *for other purposes, such as* proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." (Emphasis supplied.) The language of the statute is clear and unambiguous. The list which follows the introductory language is one of examples, and not restrictions. Evidence of other bad acts may be introduced under § 27-404(2) whenever the evidence is relevant, so long as it is offered to prove something other than the character of a person in order to show that he or she acted in conformity therewith.

In the case of *State v. Kern, ante* p. 177, 185, 397 N.W.2d 23, 29 (1986), we recently examined that entire issue, and said:

> It is well established that § 27-404(2) is an inclusionary rule permitting the use of relevant other crimes, wrongs, or acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character. Thus, § 27-404(2) permits evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show defendant's propensity or disposition to commit the crime charged. [Citations omitted.]

We then went on further in *Kern, supra* at 185, 397 N.W.2d at 29, to say:

> We have also observed that the admissibility of evidence concerning other conduct must be determined upon the facts of each case and that no exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is remote.

See, also, *State v. Robb, ante* p. 14, 395 N.W.2d 534 (1986).

The letter of June 21, 1985, was offered to show that Kenny intended to order and receive LSD and that the envelope received on September 9, 1985, was not an unsolicited package received by Kenny without his knowledge.

The relevancy of the letter of June 21, 1985, in which Kenny earlier ordered material from Hurley, is best established by Kenny's own brief. As one of Kenny's propositions of law he argues that the evidence was insufficient to establish beyond a reasonable doubt the elements of the crime. Specifically, he argues:

> The simple truth herein is that Defendant was in possession of a brown manila envelope (Exhibit 14) for a few brief seconds and it was later discovered that the envelope contained Lysergic Acid Diethylamide (Exhibit 19).
>
> There is no evidence introduced at the trial that indicated that the Defendant at anytime knew what was in the envelope. The only thing that Mr. Kenney did was simply go and get his mail on the date in question.
>
> Without the alleged "prior bad act" letter there would

> have been not [sic] evidence whatsoever that the Defendant had ever had any contact with any one in Santa Cruz, California.

Brief for Appellant at 16-17.

Without conceding that the case against Kenny could not have been established absent the letter, we do concede, as apparently does Kenny, that the letter was extremely relevant to establish that Kenny was not simply the recipient of an unsolicited letter from an unknown sender. The letter was extremely relevant to show prior course of conduct disclosing knowledge, to wit: an earlier ordering of LSD from the very same person who subsequently sent an envelope containing LSD. Our examination of the record leads us to the conclusion that the letter of June 21, 1985, was extremely relevant to establish knowledge and intent on the part of Kenny and was admissible as evidence of other prior bad acts under § 27-404(2).

That leaves us, then, only with the claim that the sentence imposed was excessive. We have repeatedly held that a sentence which is within the range of the statute will not be disturbed, absent an abuse of discretion. See, *State v. Bovill*, 223 Neb. 764, 393 N.W.2d 715 (1986); *State v. Whitehurst, ante* p. 174, 396 N.W.2d 288 (1986).

As we have noted, in the instant case the crime charged was a Class IV felony, punishable by a maximum of 5 years' imprisonment, or a fine of $10,000, or both imprisonment and fine. Thus, Kenny's sentence was well within the statutory limits.

An examination of the presentence investigation discloses no abuse of discretion, and therefore the sentence must stand. The verdict and judgment are therefore, in all respects, affirmed.

AFFIRMED.

THOMAS G. HARPER, PLAINTIFF, V. NORBERTO R. SILVA, M.D., ET AL., DEFENDANTS.
399 N.W.2d 826

Filed January 30, 1987. No. 86-273.

Medical Malpractice. The Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 1984), does not have application to acts of negligence committed by otherwise qualified health care providers outside the boundaries of this state.

Certified Questions from the U.S. District Court for the District of Nebraska. Judgment entered.

Debra R. Nickels of Welsh, Sibbernsen & Roach, Gary D. McCallister, and Philip A. Burdick, for plaintiff.

John P. Grant and Robert G. Lange and, on brief, Robert M. Spire, Attorney General, and Martel J. Bundy, for defendant Excess Liability Fund.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ.

WHITE, J.

Finding no controlling precedent, the U.S. District Court for the District of Nebraska has certified three questions of law, pursuant to Neb. Rev. Stat. § 24-219 (Reissue 1985), to this court. The facts giving rise to the controversy in this case have been recited to us as follows.

The parties to the action in the U.S. District Court are plaintiff, Thomas G. Harper, and defendants Dr. Norberto R. Silva and Falls City Surgical Associates. The State of Nebraska Excess Liability Fund was originally impleaded as a third-party defendant, then later named as a defendant in a separate complaint. At all times relevant to this action Dr. Silva was a resident of Nebraska and employed by Falls City Surgical Associates. Both Dr. Silva and his employer are qualified health care providers under Nebraska statutes.

At the time of the alleged negligent acts, Dr. Silva was licensed to practice medicine in both Nebraska and Kansas. The parties agree that Dr. Silva, while acting within the scope of his employment, departed from the normal standard of care. As a

result the plaintiff required additional treatment and medical care. All acts of negligence occurred in Kansas. The negligence of Dr. Silva is imputed to his employer, Falls City Surgical Associates, on the theory of respondeat superior. The net damages suffered by the plaintiff total $215,000, of which $100,000 has been paid by the defendants' insurer. The U.S. District Court has addressed the following questions to this court:

> 1. Whether the Nebraska Excess Liability Fund created by [Neb. Rev. Stat. § 44-2829 (Reissue 1984)], may be liable for negligent acts of qualified doctors which are committed outside the boundaries of the State of Nebraska.
>
> 2. Whether, when a plaintiff sues both a physician and the professional corporation with which he is associated, both of whom are qualified health care providers under the Act, each must separately pay $100,000.00 before the Excess Liability Fund may be called upon to pay damages.
>
> 3. Whether, in the circumstances of this case, interest should be payable to the plaintiff from the date of the stipulation between the plaintiff and the Fund as to the amount of plaintiff's damages.

Addressing the first question of whether the Nebraska Excess Liability Fund is liable for the negligent acts of qualified physicians which are committed outside the boundaries of the State of Nebraska, the plaintiff bases his argument that the fund is liable on two grounds: first, that the relationship between the defendant Dr. Silva and the State of Nebraska is sufficient to bring this case under the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 1984); and, second, that it is the intent of the act to cover acts of negligence committed by qualified physicians outside the boundaries of the state. We agree with neither contention.

The plaintiff argues that the issues presented by the case at hand are very similar to the issues presented to the Supreme Court of Michigan by the case of *Sexton v Ryder Truck Rental*, 413 Mich. 406, 320 N.W.2d 843 (1982). In this case the Michigan Supreme Court faced the issues of whether the

doctrine of lex loci delicti was still viable in that state and whether Michigan's owners' liability statutes have extraterritorial applicability. *Sexton* consolidated two cases brought under Michigan's owners' liability statutes. The first was a case in which a Ryder rental truck, rented in Michigan by Michigan residents, was involved in a one-vehicle accident in Virginia. Sextons sued Ryder for damages. The second case involved an aircraft rented in Michigan by a Michigan corporation, which crashed in Ohio and killed the pilot and a passenger. The survivors of the passenger sued the leasing company. In both cases the only contact with the state in which the accident occurred was that the accident occurred there. In *Sexton* neither plaintiff had any connection with the state in which the accident occurred, nor was there any damage to the property or residents of Virginia or Ohio.

Applying what appears to be a traditional sufficiency of the contacts analysis, the Michigan Supreme Court held that the application of the Michigan owners' liability statutes to these cases was not extraterritorial, since the owner-operator relationship took place exclusively in Michigan. In each case the only contact with the place of the accident was that the accident occurred there. All other contacts were between the parties and the State of Michigan. The plaintiff now argues that in the case at hand, under the *Sexton* theory, the application of the Nebraska Hospital-Medical Liability Act to this case would not be an extraterritorial application of that act.

There are substantial differences between the case at bar and the facts of the cases involved in *Sexton*. This case involves more contact with the state in which the injury occurred than simply that the injury occurred there. Dr. Silva was licensed to practice in Kansas, and the injury occurred in Kansas to a Kansas resident. Any analogy that the plaintiff attempts to draw between this case and *Sexton* fails in view of these differences.

Additionally, Nebraska appears to follow the approach of Restatement (Second) of Conflict of Laws, which provides:

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the

> particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws § 146 at 430 (1971). See, e.g., *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 251 N.W.2d 383 (1977). From a traditional balancing of contacts approach, the *Sexton* court logically concluded that the State of Michigan would have more interest in the cases involved than either Ohio or Virginia. We cannot, under these facts, conclude that there are more contacts with the State of Nebraska than with the State of Kansas. Clearly, the State of Kansas here has a far more significant interest in this case in view of the relationship it has to the parties involved.

The plaintiff next argues that the legislative intent of the Nebraska Hospital-Medical Liability Act is to provide for extraterritorial application of the act, citing in support several cases from other states which have permitted extraterritorial application of workers' compensation statutes and dramshop acts. Again, we cannot accept the plaintiff's contention. The general rule governing the issue of extraterritorial application is that statutes enacted by a state legislature apply to all rights which, and all persons who, come within the limits of the state. 73 Am. Jur. 2d *Statutes* § 356 (1974). From our examination of the language of the act itself and its legislative history, we can find nothing which either specifically limits the act to this state or provides for application of the act beyond the boundaries of this state.

The first section of the act provides:

> (1) The Legislature finds and declares that it is in the public interest that competent medical and hospital services be available *to the public in the State of Nebraska at reasonable costs*, and that prompt and efficient methods be provided for eliminating the expense as well as the useless expenditure of time of physicians and courts in nonmeritorious malpractice claims and for efficiently resolving meritorious claims. It is essential in this state to assure continuing availability of medical care and to encourage physicians to enter into the practice of medicine

> in Nebraska and to remain in such practice as long as such physicians retain their qualifications.
>
> (2) The Legislature further finds that at the present time under the system in effect too large a percentage of the cost of malpractice insurance is received by individuals other than the injured party. The intent of sections 44-2801 to 44-2855 is to serve the public interest by providing an alternative method for determining malpractice claims in order to improve the availability of medical care, to improve its quality and to reduce the cost thereof, and to insure the availability of malpractice insurance coverage at reasonable rates.

(Emphasis supplied.) § 44-2801. This language only suggests that the intent of the Legislature in enacting the Nebraska Hospital-Medical Liability Act was to ensure that hospital and medical care be available to the people of Nebraska, but does not expressly limit the application to citizens of Nebraska and, more importantly, does not provide for extraterritorial application.

It is a settled principle of statutory construction that when ambiguity exists, recourse should be had to legislative history to determine the intent of the lawmakers. *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985). The introducer's statement of purpose during the committee hearings for L.B. 703 reads:

> This Bill relates to the problem which confronts hospitals, members of the medical profession and citizens of this state as a result of the great increase in malpractice litigation and the cost of such litigation as well as the great increase in the cost of malpractice insurance and the questionable availability of such insurance in the future.
>
> . . . .
>
> Failure to enact this type of legislation could result in the loss of professional services that are presently available to the citizens of this state. It is imperative that the Legislature act now in order that insurance coverage will continue to be available to all members of the medical profession.

Statement of Purpose, L.B. 703, Public Health and Welfare

Committee, 84th Leg., 2d Sess. (Jan. 27, 1976).

Later, in the committee hearing, Senator Cavanaugh stated, "The ultimate goal here is to continue the best quality health care to the citizens of the state of Nebraska, and to devise some method to arrest the cost that [sic] health care due to escalating malpractice." Public Health and Welfare Committee Hearing, L.B. 703, 84th Leg., 2d Sess. 22-23 (Jan. 27, 1976). L.B. 703 was enacted in substance as 1976 Neb. Laws, L.B. 434.

In view of the language of the legislative history and the statement of the purpose of the act found in the first section of the Nebraska Hospital-Medical Liability Act, we conclude that the act was intended to cover only those qualified health care providers practicing within the boundaries of this state. The legislative history clearly states that the intent of the Nebraska Hospital-Medical Liability Act is to protect and encourage health care within the State of Nebraska and does not apply to an instance such as the one presented in the case before us involving injury to a Kansas citizen being operated on in the State of Kansas. By so finding, we need not address the second and third questions certified to this court.

JUDGMENT ENTERED.

STATE OF NEBRASKA, APPELLEE, V. TODD SCHRECK, APPELLANT.
399 N.W.2d 830

Filed January 30, 1987. No. 86-557.

1. **Aiding and Abetting.** A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.
2. _____. Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Avis R. Andrews, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

After trial to a jury the defendant was found guilty of aiding and abetting Cynthia Capps to deliver marijuana in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1985). The defendant was sentenced to imprisonment for 3 to 10 years, the sentence to run concurrently with a sentence for forgery, which the defendant was then serving.

The defendant has appealed and contends (1) the verdict is contrary to law, (2) the verdict is not supported by sufficient evidence, and (3) the sentence imposed was excessive and constituted an abuse of discretion by the district court.

The offense occurred when Capps, a friend of the defendant, brought two marijuana cigarettes concealed in a pair of socks to the jail in Dodge County, Nebraska. The socks were to be delivered to the defendant, who was then an inmate of the jail. The marijuana cigarettes had been given to Capps by the defendant's brother for delivery to the defendant. In a telephone conversation the defendant had instructed Capps on how she was to pass the marijuana cigarettes to him during a sentencing hearing on a probation violation. Fearing that she would be caught, Capps did not follow through with that plan.

After the hearing, the defendant again telephoned Capps. The defendant was angry that Capps had not delivered the marijuana and gave her instructions on how to deliver it to him in jail by concealing it in his socks. When Capps acted concerned about doing this, the defendant told her she would not be caught because the items would not be searched. Capps testified that she took the cigarettes to the jail with the intent of delivering them to the defendant, knowing or believing the substance to be marijuana.

Upon her arrival at the jail the socks were delivered to a corrections officer, who discovered the cigarettes concealed in

the socks. Upon being questioned, both Capps and the defendant admitted the offense had been committed.

As to the first two assignments of error, the defendant argues that a suggestion incapable of being taken seriously by a reasonable person cannot be a basis for a charge of aiding and abetting a crime.

Under Neb. Rev. Stat. § 28-206 (Reissue 1985), "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender."

Recently, in *State v. Bennett*, 219 Neb. 601, 606, 365 N.W.2d 423, 426-27 (1985), we stated:

> Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.

There is no requirement that the defendant participate in a criminal act that is likely to succeed without the perpetrators getting caught.

In regard to a similar earlier statute, we said:

> Aiding and abetting involves some participation in the criminal act or involves some conscious sharing in the criminal act, as in something that the accused wishes to bring about, in furtherance of a common design, either before or at the time the criminal act is committed, and it is necessary that he seeks by his action to make it succeed.

State v. Foster, 196 Neb. 332, 336, 242 N.W.2d 876, 879 (1976). While this language may suggest that the defendant's participation must amount to an effort to see the crime through to fruition, it does not support a view that encouraging a criminal act that involves a high risk of getting caught is an innocent act.

The evidence was more than sufficient for the jury to find the defendant guilty beyond a reasonable doubt, and the verdict was not contrary to law.

Finally, the defendant maintains that his sentence is excessive because it is disproportionate to the crime committed. The

defendant was convicted of a Class III felony, which, pursuant to Neb. Rev. Stat. § 28-105(1) (Reissue 1985), carries a maximum penalty of 20 years' imprisonment, or a $25,000 fine, or both, and a minimum sentence of 1 year's imprisonment. See, also, § 28-416(2)(b). The defendant was sentenced to imprisonment for 3 to 10 years, to be served concurrently with a sentence of 20 months to 5 years imposed in April 1985 on a forgery charge.

The defendant is 21 years old. His prior record includes a 1985 Class IV felony forgery conviction, a 1985 probation revocation arising out of a conviction for resisting arrest, and convictions on two counts of criminal attempt in 1983. The defendant's life has been disrupted and unstable since he was 11 years of age. He admits having drug and alcohol problems. Earlier, his participation in an inpatient treatment program for drugs and alcohol was terminated for inappropriate behavior.

In imposing the sentence, the trial court noted that the defendant had a long history of involvement with the law and was incarcerated on another charge at the time of sentencing. The court concluded that the defendant had continually failed to show respect for the judicial system and the laws of this State, as evidenced by his attempt to smuggle marijuana into jail.

Although severe, the sentence was not excessive in view of the defendant's record and the circumstances of the case. There was no abuse of discretion.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT P. FREDERIKSEN, APPELLANT.

400 N.W.2d 225

Filed January 30, 1987. No. 86-577.

Evidence: Proof. A photocopy of a writing is admissible in evidence to the same extent as the original unless a genuine question is raised as to the authenticity of the original or, under the circumstances, it would be unfair to admit the duplicate in

lieu of the original. The burden of raising an issue as to the authenticity of the original or the unfairness of the circumstances is on the party opposing admission.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Thomas J. Young of Young, LaPuzza & Stoehr, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

The defendant appeals the affirmance by the district court for Douglas County of his conviction in the county court for Douglas County for second offense driving while intoxicated.

On October 15, 1985, the defendant consumed four or five beers at a friend's house. On the way home the defendant had to take evasive action to avoid an oncoming car and in so doing struck a tree. He hit his head against the windshield and was in a daze after the accident.

The officer who arrived at the scene testified that he detected a moderate odor of alcohol coming from the defendant and that the defendant was unsure of his footing. The officer asked the defendant to perform field sobriety tests. The defendant responded that he had multiple sclerosis and could not accomplish the tests. The officer took the defendant to his cruiser and asked him to perform verbal sobriety tests. Based on his observations of the defendant, the officer concluded the defendant was under the influence of alcohol to a sufficient extent to impair his ability to operate a motor vehicle. On cross-examination, however, the officer did admit that the defendant's inability to pass the sobriety tests could have been caused by the injury he sustained in the accident.

The defendant was taken to the police station, where a breath test was performed during the early morning hours of October 16. The reading was .214 percent weight by volume. At trial the defendant objected to the admission of photocopies of

documentary evidence relating to the testing and maintenance of the Intoxilyzer machine and the license possessed by the person who performed the test.

On appeal the defendant contends the county court erred when it allowed photocopies of that documentary evidence to be admitted into evidence without first requiring the State to have brought the originals to trial for inspection by the defendant. Because that documentary evidence provided the foundation for the admission of the breath test, the defendant also contends the county court erred when it admitted the breath test result into evidence. Finally, the defendant contends that, because the breath test was improperly admitted, the county court erred when it found the defendant guilty of violating Neb. Rev. Stat. § 39-669.07(2) (Reissue 1984). We affirm the district court's determination that the county court did not err.

Neb. Rev. Stat. § 27-1002 (Reissue 1985) governs the introduction of documents into evidence. That section provides in part: "To prove the content of a writing . . . the original writing . . . is required, except as otherwise provided in these rules . . . ." One of the exceptions to this rule is that found in Neb. Rev. Stat. § 27-1003 (Reissue 1985). That section provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Neb. Rev. Stat. § 27-1001(4) (Reissue 1985) in pertinent part defines "duplicate" as "a counterpart produced . . . by means of photography . . . or by other equivalent techniques which accurately reproduce the original." Thus, in order to be a duplicate, a photocopy must be an accurate reproduction of the original document. Here, the witnesses who supplied the foundation for the documentary evidence testified the photocopies were exact copies of the originals. Therefore, the State properly established that the copies introduced were "duplicates" of the original documents and were properly admissible unless "(1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

§ 27-1003.

The burden of raising an issue as to the authenticity of the original is on the party opposing admission. *United States v. Georgalis*, 631 F.2d 1199 (5th Cir. 1980); *United States v. DiMatteo*, 716 F.2d 1361 (11th Cir. 1983). See *State v. Costello*, 199 Neb. 43, 256 N.W.2d 97 (1977). It follows then that it is also the defendant's burden to show how in the circumstances it would be unfair to admit the duplicate.

At trial the defendant did not question the authenticity of the originals. Instead, he merely argued that the State should have produced the originals at trial so he could review them. With reference to at least one exhibit, defendant indicated that he would not have objected to the State's withdrawing the original and substituting a copy. Although not articulated as such, the defendant's argument is basically one of "unfairness." He believes it is unfair to admit duplicates of available original documents in the control of the State when he has not had a chance to make sure the originals actually exist and to compare them to the duplicates.

In support of this argument the defendant cites *State v. Costello, supra*. In that case, to prove an insufficient funds charge, the State was allowed to introduce photocopies of the checks in question. One of the reasons this court affirmed the district court's admission of those checks into evidence was because the originals had been returned to either the payees or the defendant. The defendant in this case believes that was the only reason the admission of those checks in *Costello* was proper. That is not the case. As we stated:

> In this case there is no genuine question raised at trial as to the authenticity of the original checks received by the Wisconsin bank. . . . Contrary to defendant's contention, the photocopies are legible such that the signatures of the drawer and payee, and the amount and date of each check are discernible. The officer of the Wisconsin bank testified to the fact that the photocopies are accurate representations of the originals, and he had personally reviewed the originals before they were photocopied and returned unpaid. Under the circumstances of the case, it was not unfair to admit the duplicates in lieu of the

originals.

Id. at 55-56, 256 N.W.2d at 105.

Similarly, the defendant in this case did not meet his burden of showing the "unfairness" of introducing the photocopies into evidence. First, the record does not indicate that, prior to trial, the defendant ever asked to review the documents in question or that the State refused to comply with any such requests. Second, the witnesses who supplied the foundation for the documentary evidence testified the photocopies were exact copies of the originals. If the defendant had wanted to cast doubt on this testimony and thereby show why the admission of the photocopies would be unfair to the defendant, he could have questioned the witnesses as to the foundation for their statements. This the defendant did not do. Thus, he failed to make a sufficient showing of why it would be unfair to introduce the photocopies into evidence without him first having had a chance to review the originals.

The defendant next contends that the result of the breath test performed on him was improperly admitted into evidence for two reasons. First, he contends the test result was improperly admitted because the necessary foundation for the admission of that test result as set forth in *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980), the documentary evidence previously discussed, was improperly admitted. Because we have determined the documentary evidence was properly admitted, this contention has no merit.

Second, the defendant contends the test result was improperly admitted into evidence because the 190-day percent deviation check of the Intoxilyzer performed by the Department of Health on October 16, 1985, exhibit 7, was based on a calculation at the testing site made on December 21, 1984, exhibit 5, and therefore could not have been the basis for the October 16 deviation check. In making this argument the defendant misconstrues the purpose of the operation performed on December 21, 1984.

Neb. Admin. Code tit. 177, ch. 1, § 007.06B (1984) provides: "Testing devices used for direct breath testing shall have been checked within 190 days prior to an analysis by a person responsible for maintenance and calibration." (Emphasis

omitted.) Section 007.06B1 then details how that check shall be made. Basically, the person responsible for maintenance at a site shall request from the Department of Health a simulator check sample. That sample is then tested at the site and the results forwarded to the Department of Health, which will then compare the test result received with the known value of the sample to determine that the percent deviation is within the allowable plus or minus 10-percent figure. The test at the site was performed on October 2, 1985, well within the 190-day requirement when compared to the analysis of the defendant's breath on October 16, 1985.

However, the defendant insists that the verification and certification of reference standards required by Neb. Admin. Code tit. 177, ch. 1, § 007.04C (1984), which standards are used for checking direct testing devices, and which verification was made on December 21, 1984, must also be done within the 190-day period. This is not true.

Section 007.04C states as follows:

> Certain reference standards used . . . for calibration and for verification of direct breath testing devices which are approved for use are:
>
> . . . .
>
> 007.04C2 Intoxilyzer reference standard, manufactured by CMI, Inc., and consisting of a beam attenuatory accessory is an approved standard provided the target value of the reference standard has been verified according to the following steps and certified prior to placement into service at a testing site.

(Emphasis omitted.) There then follow instructions for determination of the assigned target value of the reference standard for that beam attenuatory accessory.

Although the State has done less than a satisfactory job of explaining the nature of a beam attenuatory accessory, we conclude from the testimony of the person certified as the onsite maintenance and calibration person that it is a lens-like object, identified specifically by a serial number, which is inserted into the particular testing device as a reference standard to ensure that the calibration of the testing device is correct. In other words, as we view the record, the beam

attenuatory accessory is not a mechanical device which needs testing and adjusting from time to time, but rather amounts to a fixed standard, which target value once determined does not change. There is no reason for nor is there anything in the rules and regulations which would require a redetermination of that target value of the beam attenuatory accessory.

Exhibits 5 and 7 and the Intoxilyzer test of the defendant's breath properly were admitted in evidence.

The defendant's final contention is that the court erred in finding the defendant guilty of violating § 39-669.07(2) because the breath test was improperly admitted. We have determined the breath test was properly admitted, that test showing a .214-percent reading. Section 39-669.07, the statute prohibiting driving while intoxicated, provides that such offense may be committed by being under the influence of alcoholic liquor or having ten-hundredths of one percent or more by weight of alcohol in the body fluid. *State v. Hilker*, 210 Neb. 810, 317 N.W.2d 82 (1982). Because the defendant was above the .1-percent statutory limit, he properly was found guilty of the offense charged. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHRIS B. GONZALES, APPELLANT.

399 N.W.2d 832

Filed January 30, 1987. No. 86-662.

1. **Sentences: Appeal and Error.** Generally, a sentence imposed within the statutorily set limits will not be overturned on appeal, absent an abuse of discretion on the part of the sentencing court.
2. **False Reporting: Intent.** To commit the crime of false reporting one need not actually impede a police investigation, but must furnish false information with the intent to impede the investigation of a criminal matter.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Richard Biggs of Winner, Nichols, Douglas, Kelly and Arfmann, for appellant.

Robert M. Spire, Attorney General, and Lisa D. Martin-Price, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal from the Scotts Bluff County District Court's order affirming the Scotts Bluff County Court's conviction and sentence of the appellant, Chris B. Gonzales. The appellant was charged with and pled guilty to one count of driving without a valid driver's license, in violation of Neb. Rev. Stat. § 60-403 (Reissue 1984); one count of leaving the scene of an accident, in violation of Neb. Rev. Stat. § 39-6,104.02 (Reissue 1984); and one count of giving false information to a police officer, in violation of Neb. Rev. Stat. § 28-907(1)(a) (Reissue 1985). The appellant was sentenced to 1 month's imprisonment for count I, fined $100 for count II, and sentenced to 1 year's imprisonment for count III, to be served concurrently with his sentence for count I.

Gonzales appealed the county court's judgment to the Scotts Bluff County District Court, alleging as error that the 1-year term of imprisonment imposed for count III was excessive and that the county court judge did not have an adequate factual basis upon which to accept his plea of guilty to false reporting. The district court affirmed the county court, and this appeal followed. Gonzales again alleges as error that the 1-year term of imprisonment imposed for count III is excessive and that the county judge did not have an adequate factual basis upon which to accept the appellant's plea of guilty to giving false information to a police officer. We affirm.

Generally, a sentence imposed within the statutorily set limits will not be overturned on appeal, absent an abuse of discretion on the part of the sentencing court. *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986). False reporting to a police officer is a Class I misdemeanor, punishable by a $1,000 fine, or 1 year's imprisonment, or both. Gonzales was sentenced to 1

year's imprisonment for this count, to be served concurrently with the 1-month term of imprisonment imposed for his driving without a valid license conviction. While this sentence is the maximum allowable by the statute, it is within the statutorily set limits, and the record reveals no abuse of discretion on the part of the sentencing court. We find this assignment of error to be meritless.

The appellant next assigns as error that there was no factual basis established upon which the sentencing court could have accepted the appellant's plea of guilty to count III. The factual basis for all three charges was presented to the sentencing court as follows:

> MR. SILVERMAN: In regard to all three counts, Your Honor, there was an accident within the city of Scottsbluff. Scottsbluff officers went to investigate that accident. The vehicle had hit a parked car, had left the scene of the accident. The officers found that vehicle parked in an alley between 8th Street and 9th Street in Scottsbluff. They contacted the defendant; the defendant told them the car had been there all day and had never been moved. They checked the car and saw that the car had been involved in the accident and also had been involved in the accident that they were investigating, so they knew that was a lie.
>
> They contacted another individual who was in the car at the time. That individual informed them that Chris was, in fact, the driver of the vehicle when it had the wreck. He was told to stop, but he didn't. And when they checked his operator's license, his operator's license was expired. So that's factual basis for all three counts.

Although this was the factual basis for the appellant's pleas of guilty to all three counts, Gonzales challenges only the sentencing court's acceptance of his guilty plea to count III.

Section 28-907(1)(a) provides:

> (1) A person commits the offense of false reporting if he or she:
>
> (a) Furnishes information he or she knows to be false to any peace officer or other official with the intent to instigate an investigation of an alleged criminal matter or

> to impede the investigation of an actual criminal matter
> . . . .

Gonzales argues that the factual basis offered to the county court judge fails to show that his misstatements actually impeded the investigation of the accident. The appellant contends that impeding the investigation is an element of the crime of giving false information to a police officer, and, without it, no crime has been committed. We can find no support for the appellant's contentions in the applicable case law. In *State v. Ewing*, 221 Neb. 462, 378 N.W.2d 158 (1985), the elements of the crime of false reporting were set out as (1) giving false information to a peace officer, (2) with the intent to impede an investigation of (3) an actual criminal matter. Nowhere is it said that actual impediment of an investigation is an element of this crime. See *In re Interest of McManaman*, 222 Neb. 263, 383 N.W.2d 45 (1986).

From the record it is evident that an adequate factual basis existed upon which the county court judge could have accepted the appellant's guilty plea. The appellant gave a false statement to the police officer conducting the investigation, from which the fact finder could infer that the appellant intended to prevent the police officers from discovering that he was the driver of the car involved in the accident. Finally, a traffic offense is a criminal offense, thereby satisfying the third element of the crime of false reporting. *State v. Knoles*, 199 Neb. 211, 256 N.W.2d 873 (1977). From this factual basis the county court was able to determine that the appellant was guilty of the crime charged. We find this assignment of error to be also without merit.

AFFIRMED.

CAROL BEATTY, APPELLEE, V. EMMALINE DAVIS, DECEASED, APPELLEE, AND ORNAN DAVIS, APPELLANT.

400 N.W.2d 850

Filed February 13, 1987. No. 85-453.

1. **Negligence: Evidence.** The doctrine of res ipsa loquitur is that where the instrumentality causing the injury is shown to be under the defendant's exclusive control and management and the accident is one that in the ordinary course of things does not occur if those who have its management or control use proper care, reasonable evidence is afforded, in the absence of an explanation by the defendant, that the accident arose from want of proper care.
2. _____: _____. If specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable.
3. **Damages: Jury Instructions.** Where the plaintiff claims damages for lost wages, and the trial court instructs the jury that the plaintiff can recover damages for wages lost due to the inability of the plaintiff to work, it is not error to refuse to instruct that the plaintiff has a duty to mitigate damages.
4. **Jury Instructions.** Counsel has the duty of tendering a more specific instruction where one is desired.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

J.L. Zimmerman, for appellant.

Robert W. Mullin of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

This was an action by the plaintiff, Carol Beatty, to recover damages for the personal injuries she sustained on November 2, 1981, when the defendants' automobile ran over her.

The plaintiff and the defendants, Emmaline Davis and Ornan Davis, were neighbors living in a trailer court in Scottsbluff, Nebraska. On the day of the accident Emmaline Davis, intending to go shopping, started their 1977 Pontiac Bonneville automobile, which was parked in front of their trailer. Realizing that she had forgotten her glasses, Mrs. Davis left the engine running and returned to the trailer. Later, Mrs. Davis told an investigator that she left the gearshift in park

position. After retrieving her glasses and talking with her husband, she returned and found the vehicle traveling in a reverse circular path at idling speed.

At about this time the plaintiff was working in a flowerbed at the rear of her mobile home. When she heard some noise, she came around to the front of her home and discovered the Davis vehicle had struck a yard light near her trailer and was still moving, with no one in control. Seeing the driver's-side door open, the plaintiff attempted to jump in and stop the vehicle. The plaintiff testified that she did so at Mrs. Davis' request and because the plaintiff thought the vehicle might hit Mrs. Davis and her own trailer home. Mrs. Davis denied asking the plaintiff to stop the car.

The plaintiff was able to grasp the steering wheel, but was struck by the open car door, which caused her to fall to the ground. The vehicle then ran over her left knee and lower right leg. She crawled to the safety of the Davis lawn, as the vehicle struck a concrete block wall and finally came to a stop when a block from the wall lodged behind one of the wheels.

The second amended petition alleged that Mrs. Davis' general negligence, the specific acts of which were unknown, was the direct and proximate cause of the accident and the plaintiff's injuries. Mrs. Davis' negligence was alleged to be imputed to her husband, the defendant Ornan Davis, because the automobile was a family purpose automobile. The plaintiff prayed for $8,157.78 in special damages for medical expenses, damages for lost income, and general damages.

The answer denied that Mrs. Davis had put the vehicle in reverse gear or that the defendants had been negligent in any way. The answer also alleged that the plaintiff had assumed the risk as a volunteer and had committed acts of contributory negligence which were more than slight. The defendants also claimed a setoff of $5,099.89 because of medical payments made by their insurance carrier.

Mrs. Davis died prior to trial. The jury returned a general verdict for the plaintiff in the amount of $84,811.20. The defendant Ornan Davis has appealed.

On appeal the defendant contends the trial court erred (1) in overruling his motion for a directed verdict or, alternatively, by

failing to order a mistrial; (2) in failing to give his requested instructions on the duty to mitigate damages and on the duty of a volunteer; (3) in giving instruction No. 9, because it failed to state the necessary elements of the rescue doctrine; and that (4) the judgment is not sustained by sufficient evidence.

The first issue concerns whether the plaintiff's proof went too far in proving specific acts of negligence and therefore eliminated res ipsa loquitur as a means of proving her case.

The doctrine of res ipsa loquitur is that where the instrumentality causing the injury is shown to be under the defendant's exclusive control and management and the accident is one that in the ordinary course of things does not occur if those who have its management or control use proper care, reasonable evidence is afforded, in the absence of an explanation by the defendant, that the accident arose from want of proper care. *Nownes v. Hillside Lounge, Inc.*, 179 Neb. 157, 137 N.W.2d 361 (1965); *Sober v. Smith*, 179 Neb. 74, 136 N.W.2d 372 (1965).

When applicable, the essence of the doctrine is that an inference of negligence arises without further proof, and the facts speak for themselves. *McCall v. St. Joseph's Hospital*, 184 Neb. 1, 165 N.W.2d 85 (1969); *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.*, 157 Neb. 923, 62 N.W.2d 127 (1954). Liability then becomes an issue for the jury. *Security Ins. Co., supra.*

In Nebraska it is clear that if specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable. See, *Lund v. Mangelson*, 183 Neb. 99, 158 N.W.2d 223 (1968); *Nekuda v. Allis-Chalmers Manuf. Co.*, 175 Neb. 396, 121 N.W.2d 819 (1963); *Security Ins. Co., supra; Miratsky v. Beseda*, 139 Neb. 229, 297 N.W. 94 (1941); *Knies v. Lang*, 116 Neb. 387, 217 N.W. 615 (1928). The doctrine is applicable only where the plaintiff is unable to allege or prove the particular act of negligence which caused the injury. *Security Ins. Co., supra.*

In the present case no specific acts of negligence were alleged in the petition. Instead, the defendant complains that the specific act of negligence resulting in the injury, i.e., Mrs. Davis' leaving the vehicle in reverse gear, was clearly proved at

trial.

In *Knies v. Lang, supra*, this court indicated that res ipsa loquitur would not apply in a case where the evidence showed the "precise" cause of the accident. The court in *Knies* also made reference to the discussion of the doctrine in *McAnany v. Shipley*, 189 Mo. App. 396, 176 S.W. 1079 (1915). In that case the court reasoned that while the doctrine is unavailable where the *precise* cause is shown, the plaintiff does not lose the benefit of the doctrine by introducing evidence of specific acts of negligence, where the evidence leaves the cause of the accident in doubt or does not clearly show the cause. *McAnany v. Shipley, supra.*

Also, in *Security Ins. Co. v. Omaha Coca-Cola Bottling Co., supra* at 928, 62 N.W.2d at 131, we stated:

> "[A]n unsuccessful attempt on the part of plaintiff to show the specific negligent act which caused his injury does not weaken or displace the presumption of negligence on the part of the defendant arising from the facts of the case by virtue of the rule of res ipsa loquitur."

Quoting 65 C.J.S. *Negligence* § 220(6) (1950).

Finally, in *Nuclear Corporation of America v. Lang*, 480 F.2d 990, 992 (8th Cir. 1973), the U.S. Court of Appeals for the Eighth Circuit, while interpreting the doctrine as applied in Nebraska law, indicated:

> [I]t is quite generally agreed that the introduction of some evidence which tends to show specific acts of negligence on the part of the defendant, but which does not purport to furnish full and complete explanation of the occurrence does not destroy the inferences which are consistent with the evidence, and so does not deprive the plaintiff of the benefit of res ipsa loquitur. W. Prosser, Law of Torts 236 (3d ed. 1964).

The plaintiff's evidence of which the defendant complains consists of expert testimony by an experienced automobile mechanic that he had never heard of the type of transmission on the Bonneville's jumping into reverse; the plaintiff's testimony that after the accident Mrs. Davis told the plaintiff that she (Mrs. Davis) must have hit the gearshift lever with her purse as she left the car; Mr. Davis' deposition statements that the

vehicle had never jumped out of gear either before or since the time of the accident; and the plaintiff's testimony that Mrs. Davis was the only person she saw in the area when the plaintiff first discovered the runaway car.

The defendant makes no reference to the fact that the plaintiff introduced evidence that Mrs. Davis told an investigator at the scene that she had left the vehicle running and in park and that later, in a deposition, Mrs. Davis stated that she did not believe she had left the car in reverse or that she had struck the shift lever with her purse.

Considering the plaintiff's evidence, it can hardly be said that the cause of the accident was clearly shown. Mrs. Davis' statement that she must have hit the shift lever with her purse was thrown into doubt by her later statement that she did not think she had struck the shift lever or had left the vehicle in reverse. The evidence also fails to show that anyone actually witnessed what caused the vehicle to begin to move in reverse.

In considering a motion for a directed verdict, the trial court must resolve all controverted facts in favor of the nonmoving party and must give that party the benefit of any reasonable inference that can be drawn from the evidence. *Weiss v. Autumn Hills Inv. Co.*, 223 Neb. 885, 395 N.W.2d 481 (1986). The case may not be decided as a matter of law if there is any evidence which will sustain a finding for the nonmoving party. *Weiss v. Autumn Hills Inv. Co., supra.*

The evidence in the instant case, when viewed most favorably to the plaintiff, did not fully or completely establish the cause of the accident. Instead, it tended to show that no one really knew what caused the vehicle to begin to propel itself backward.

The fact that the plaintiff introduced evidence tending to show that Mrs. Davis had the best opportunity to place the gearshift in reverse did not fully explain what happened. In fact, in order for the doctrine to apply, the plaintiff was required to prove facts that were more consistent with negligence on the part of the defendants than with a mere accident or third-party intervention. See, *Knies v. Lang*, 116 Neb. 387, 217 N.W. 615 (1928); *Buzzello v. Sramek*, 110 Neb. 262, 193 N.W. 743 (1923). See, also, Restatement (Second) of Torts § 328 D, comment *f* (1965); Prosser and Keeton on the

Law of Torts, *Negligence: Proof* § 39 (5th ed. 1984).

The trial court did not err in refusing to direct a verdict, nor did it abuse its discretion in refusing to grant a mistrial. See *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980).

The defendant next contends that the trial court erred in refusing to give his requested instruction on the duty to mitigate damages. That instruction read: "A person has the duty to take such reasonable steps under the circumstances as will minimize for [sic] injuries and damages. Any damages resulting from a failure to take such reasonable steps cannot be recovered."

There was evidence that the plaintiff had been advised by one of her doctors to return to lighter work on March 3, 1982. The plaintiff had not worked at a full-time job for more than a year before the accident, due to the death of her husband. Sometime after the accident, she was offered employment as a kitchen helper but declined the offer because her injuries made it impossible to stand all day.

The defendant cites no Nebraska authority, and we have found none, in which a duty to mitigate damages has been applied to a claim for lost wages on grounds that the plaintiff could have returned to some type of work. Cases from other jurisdictions have recognized such a duty in this context. *Kubista v. Romaine*, 87 Wash. 2d 62, 549 P.2d 491 (1976); *Bell v. Shopwell, Inc.*, 119 A.D.2d 715, 501 N.Y.S.2d 129 (1986).

The duty to mitigate damages arises out of the rule of avoidable consequences. C. McCormick, Handbook on the Law of Damages § 33 (West 1935). See, also, *Tetherow v. Wolfe*, 223 Neb. 631, 392 N.W.2d 374 (1986). The rule evolves from the general principle:

> Legal rules and doctrines are designed not only to prevent and repair individual loss and injustice, but to protect and conserve the economic welfare and prosperity of the whole community. Consequently, it is important that the rules for awarding damages should be such as to discourage even persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts, or from actively increasing such loss where prudence would require that

> such activity cease. The machinery by which the law seeks to encourage the avoidance of loss is by denying to the wronged party a recovery for such losses as he could reasonably have avoided, and by allowing him to recover any loss, injury, or expense incurred in reasonable efforts to minimize his injury.

C. McCormick, *supra* at 127.

Some authorities, however, consider the rule and the duty to mitigate damages arising out of it "as but an application of the principle which denies liability for injurious consequences which are not proximately caused by the defendant's wrongdoing." C. McCormick, *supra* at 128. A criticism of this characterization has been that stated in terms of proximate causation, the jury is likely to become confused, i.e., it may tend to award damages for injuries which the plaintiff could have avoided, because it is instructed to compensate for all injuries which in natural and continuous sequence, unbroken by an efficient intervening cause, flowed from the defendant's acts. J. Stein, Damages and Recovery: Personal Injury and Death Actions § 126 (1972).

In the present case the trial court instructed the jury as follows:

> If you find for the Plaintiff on the issue of liability, you must fix the amount of money which will fairly and reasonably compensate her for any of the following elements of damage proven by a preponderance of the evidence to have proximately resulted from the negligence of the Defendant:
>
> . . . .
>
> 4. The value of wages or salaries lost due to her inability or her diminished ability to work
>
> (a) to date
>
> (b) reasonably certain or reasonably probable to be experienced in the future.

In our view the policy considerations encompassed in the doctrine of avoidable consequences were adequately protected by the instruction given. Because the instruction limited recovery for lost wages to those proximately caused by Davis' negligence *and* due to Beatty's inability or diminished ability to

work, the jury was not permitted to award any amounts which may have arisen from an unreasonable refusal to return to work. Thus, the instruction was adequate to fairly submit the case and could not have misled the jury. See *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985). There was no prejudice in refusing to instruct the jury on the duty to mitigate damages.

Davis contends the trial court erred in submitting instruction No. 9 because it failed to advise the jury how to weigh the extent of risk which a volunteer may assume as compared to the danger to be met.

Instruction No. 9 provides: "It is not contributory negligence for the Plaintiff to expose herself to danger in an effort to save herself or others from injury to their person or property, unless the effort itself is an unreasonable one or the Plaintiff acts unreasonably in the course of it." As Davis acknowledges, a substantially similar instruction was given in *Lave v. Neumann*, 211 Neb. 97, 317 N.W.2d 779 (1982). The issue in that case involved the standard of care owed by the defendant to the plaintiff police officer. The court ultimately determined that the rescue doctrine embodied the appropriate standard and that the trial court had not erred in refusing to submit an instruction on the "fireman's rule" to the jury.

The court in *Lave, supra* at 101, 317 N.W.2d at 782, also elaborated on the meaning of the rescue doctrine:

> Under the rescue doctrine it is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm. The extent of the risk which the volunteer is justified in assuming under the circumstances increases in proportion to the imminence of the danger and the value to be realized from meeting the danger and attempting to remove or eliminate the hazard; that is, the less the danger to the third party, the less the risk the volunteer is justified in taking. *Buchanan v. Prickett & Son, Inc., supra.*

Davis complains that absent the language of the second sentence in the above quote, the jury was without guidance as to how to weigh the magnitude of the danger in relation to the

reasonableness of the attempted rescue. Further, he contends that with the benefit of this more precise instruction, the jury could have found that the plaintiff was only justified in taking minor risks to stop the vehicle.

At the trial, the defendant requested that the court submit to the jury his proposed instruction No. 7. That instruction in essence provided that a rescuer is not contributorily negligent unless her conduct involving a risk of harm is reckless. The instruction then defined reckless conduct as an act or acts which a reasonably prudent person would not commit under the circumstances existing at the time of the rescue. This instruction was very similar to that given by the trial court, and went no further than the instruction given by the trial court in providing the jury with guidance for determining the reasonableness of the attempted rescue. Counsel has the duty of tendering a more specific instruction where one is desired. *Erickson v. Monarch Indus.*, 216 Neb. 875, 347 N.W.2d 99 (1984).

Furthermore, the instruction which was given set forth the rescue doctrine essentially as defined in the Restatement (Second) of Torts § 472 (1965) was sufficient to fairly and fully instruct the jury on the law of the case, and could not have misled a jury. See *Maloney v. Kaminski, supra*. In previous cases, this court has recognized that reasonableness, as a standard applied in other contexts, provides adequate guidance to persons of ordinary intelligence when applied to specific circumstances. See *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986). There was no error in submitting instruction No. 9 to the jury.

The defendant's assignments of error regarding the trial court's alleged failure to instruct on the duty of a volunteer and regarding the sufficiency of the evidence to support the verdict were not briefed. Consideration of a case on appeal to this court is limited to errors assigned and discussed. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). See, also, *In re Interest of J.S., S.C., and L.S., ante* p. 234, 397 N.W.2d 621 (1986). Nevertheless, our review of the record shows there was sufficient evidence for the jury to find for the plaintiff. The verdict was not clearly wrong. See *Vacek v. Ames*, 221 Neb. 333, 377 N.W.2d 86 (1985).

There being no error, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARVIN E. COPPLE, APPELLANT.

401 N.W.2d 141

Filed February 13, 1987. No. 85-470.

1. **Constitutional Law: Statutes.** A statute which is clear and precise, and therefore not vague, may nonetheless fail to pass constitutional muster by virtue of being overbroad in the sense that it prohibits the exercise of constitutionally protected conduct.
2. **Constitutional Law: Statutes: Standing.** Irrespective of standing to challenge a statute for vagueness, an individual may have standing to assert that a statute is overbroad when such statute reaches a substantial amount of constitutionally protected conduct.
3. _____: _____: _____. In determining whether standing exists for a facial challenge to a statute as overbroad, a court must first determine whether the statute reaches a substantial amount of constitutionally protected conduct. If the statutory proscription does not reach a substantial amount of constitutionally protected conduct, there is no standing to challenge a statute on the basis that the statute is overbroad, and such challenge must fail.
4. _____: _____: _____. In order to have standing to challenge a statute on the ground of vagueness, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of a law as applied to the conduct of others.
5. **Criminal Law: Statutes: Constitutional Law: Due Process.** An essential purpose of a penal statute is to provide notice to the ordinary person concerning conduct which is proscribed as criminal. When a penal statute supplies an ordinary person with notice concerning conduct forbidden as criminal, such statute meets the constitutional standard of due process.
6. **Criminal Law: Evidence: Witnesses: Immunity.** At a hearing to determine whether the State had violated its agreement for immunity and restricted evidence or information, the State must present a prima facie case that it has fulfilled its agreement with the defendant, that is, demonstrate that the State's evidence, to be adduced at the defendant's trial, was obtained from a source or sources independent of the defendant and not by direct or indirect use of information obtained from the defendant as the result of defendant's agreement for immunity and restricted evidence or information.
7. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
8. **Trial: Rules of Evidence: Hearsay: Words and Phrases.** "(1) A statement is (a) an oral or written assertion or (b) nonverbal conduct of a person if it is intended by him as an assertion. . . . (3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Evid. R. 801 (Neb. Rev. Stat. § 27-801 (Reissue 1985)).
9. **Words and Phrases.** *Conceal* means to hide, secrete, or withhold from

knowledge of others; to withhold from utterance or declaration; to cover or keep from sight; to hide or withdraw from observation, cover or keep from sight, or prevent discovery. The word *conceal* pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact and has reference to some advantage to the concealing party or a disadvantage to some interested party from whom the fact is withheld.

10. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1985)).
11. **Conspiracy.** The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. The very nature of a conspiracy requires an element of intent.
12. **Conspiracy: Circumstantial Evidence.** Circumstantial evidence may establish existence of a conspiracy or the criminal intent necessary for a conspiracy.
13. **Conspiracy.** When a conspiracy has been proved, a conspirator's acts and declarations, in furtherance of the conspiracy, are the acts and declarations of all conspirators and are admissible evidence against the coconspirators.
14. _____. An overt act, as something done pursuant to a conspiracy, tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. An overt act, by itself, need not have the capacity to accomplish the conspiratorial objective and does not have to be a criminal act.
15. _____. Silence, which is designed to conceal, may indicate an intention to conspire and, if intended to facilitate the conspiracy, may be an overt act pursuant to the conspiracy.
16. **Trial: Evidence: Proof.** Prima facie proof of a case is less stringent than proof by a preponderance of the evidence. A "prima facie" case requires only enough evidence to take the question to the jury, whereas "preponderance of the evidence" requires proof which leads the jury to find the existence of the contested fact is more probable than its nonexistence.
17. **Conspiracy: Proof.** For admission of a coconspirator's act as evidence against a defendant-coconspirator being tried for a crime other than the conspiracy itself, the trial court must first determine whether the State has proved a prima facie case that (1) a conspiracy existed, (2) the defendant and the witness were members of the conspiracy, and (3) the witness' act was done during and in furtherance of the conspiracy.
18. **Conspiracy: Rules of Evidence.** Whether the State has established a prima facie case of conspiracy, thereby constituting anything within execution or furtherance of the common purpose as the act of every coconspirator, is a preliminary question for the trial court concerning admissibility of evidence. Neb. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)).
19. **Conspiracy: Appeal and Error.** A trial court's finding that a prima facie case has been established concerning existence of a conspiracy will be upheld unless such finding is clearly erroneous.
20. **Witnesses: Expert Witnesses: Appeal and Error.** Whether a witness is qualified

as an expert is a preliminary question for a trial court. Neb. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)). Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion.

21. **Appeal and Error.** In order that assignments of error as to the admission or rejection of evidence may be considered, the Supreme Court requires that appropriate reference be made to the specific evidence against which objection is urged. A party who claims error in a proceeding is required to point out the factual and legal basis that shows the error.
22. _____. To be considered by the Supreme Court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred.
23. **Jury Instructions: Appeal and Error.** Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. All other instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

David L. Herzog, P.C., for appellant.

Robert M. Spire, Attorney General, Laura L. Freppel, and Lynne R. Fritz, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

The information in the district court for Lancaster County charged Marvin E. Copple with two counts of theft in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1985), alleged to have occurred as a result of Copple's receipt of $500,000 from Commonwealth Savings Company in reference to real estate purchased by Commonwealth. A jury found Copple guilty on both counts of theft. We affirm.

Commonwealth is a Nebraska corporation licensed as an industrial loan and investment company with five members of its board of directors. Marvin Copple owned and operated a real estate investment and development company and was also a vice president and director of Commonwealth from 1978 to

1981. During those same years, Marvin's father, S.E. Copple, was Commonwealth's majority shareholder, president, and chairman of the board of directors. S.E. Copple, personally or individually, and Commonwealth had been involved in real estate development in excess of 20 years.

In November 1983 the Nebraska Department of Banking and Finance forced Commonwealth into receivership. As a result of subsequent State investigation of Commonwealth's collapse, the two theft charges were filed against Marvin Copple on January 12, 1984.

On May 10, 1984, acknowledging that Copple was under investigation regarding Commonwealth, the State, the United States, and Copple agreed to dispose of all possible criminal charges as follows: Copple would cooperate in all investigations and would testify truthfully; the federal government would file no charge against Copple; the State would file no additional charge against Copple but was entitled to continue prosecution of the two theft charges pending against Copple; and nothing restricted the State's use of "any relevant evidence within [the county attorney's] possession, providing such evidence was not derived, either directly or indirectly, from information provided by MARVIN COPPLE in performance of the terms of this agreement." On February 19, 1985, Copple filed a motion for a hearing at which the State would be required to demonstrate that all the State's evidence, to be adduced at trial, was derived independently from information supplied by Copple pursuant to the May 10, 1984, agreement with the governments. As authorized by Neb. Rev. Stat. § 29-822 (Reissue 1985), Copple then filed, on February 25, a motion to suppress all evidence "derived either directly or indirectly from the information provided by" Copple. As a basis for his motions, Copple relied on *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972), in which the U.S. Supreme Court held that, after a grant of immunity under 18 U.S.C. § 6002 (1982) (immunity from prosecution of a witness for any offense to which judicially compelled testimony relates), the government must show that its evidence is not tainted, viz, must establish that the prosecution " 'had an independent, legitimate source for the disputed evidence.' " 406

U.S. at 460. The district court determined that a *Kastigar*-type hearing was unnecessary but heard and denied Copple's motion to suppress, finding that "the State has made a prima facie showing that evidence it intends to introduce has been derived from independent sources, and said evidence has not been derived either directly or indirectly from information given the State by the defendant." Trial commenced on March 6, 1985.

In 1974 Phillip Stettinger purchased about 80 acres of land at the southeastern edge of Lincoln. Stettinger's land was zoned as residential property sometime in 1978 or 1979, and there was a preliminary plat approved in 1979 for "Stettinger Addition." Unable to obtain financing for development of the land, Stettinger decided to sell.

In January 1980 Stettinger contacted Bernie Hardesty, a real estate agent, to find a buyer for 67 acres of the Stettinger tract. Hardesty, who had previously sold developable land to Marvin Copple, contacted Copple in January 1980 concerning possible purchase of the Stettinger property. Stettinger delivered a plat of the tract to Copple's office. Several days later, Copple met with Hardesty and orally indicated he would buy the Stettinger property for $600,000. On January 25 Copple contacted Jack Tuma, an engineering consultant, for preliminary engineering work on the Stettinger land. After a second meeting with Hardesty, Marvin Copple called his father, S.E. Copple, to "seek his wisdom and his advice and see what he thought of the deal." Hardesty died on February 20, 1980. Marvin Copple never signed an agreement to purchase the Stettinger property.

Marvin Copple and S.E. Copple discussed prospects for the Stettinger tract. S.E. Copple expressed an interest in buying the property, explaining that he had a prospective purchaser for lots in the area of the Stettinger tract and that "when Marvin told me about [Stettinger's land] I wanted to buy it right away for Commonwealth." Marvin and S.E. Copple testified that they believed profit from the development of the Stettinger tract would exceed $1 million. Although they reached no agreement at their initial conference regarding Stettinger's land, Marvin and S.E. Copple again met a few days later and orally agreed that Marvin Copple, in exchange for Commonwealth's payment of $500,000 to Marvin, would allow Commonwealth

to acquire Marvin's "right" to purchase the Stettinger property. Additionally, Marvin agreed to supervise development of the Stettinger land into "buildable lots." (Apparently, "buildable lots" were those developed to a stage appropriate for construction.) That agreement between Marvin and S.E. Copple was never reduced to writing.

On February 1, 1980, Phillip and Virginia Stettinger and S.E. Copple, as president of Commonwealth, signed an agreement for sale of the Stettinger land to Commonwealth. A "final purchase agreement" was signed on May 3 by Stettingers and Commonwealth. This second agreement did not substantially alter the agreement of February 1, that is, the price and schedule of payments remained the same. The purchase price for Stettinger's 67 acres was $600,000. After Commonwealth bought the Stettinger property, Marvin Copple had some contact with the land, such as deciding where to "push more dirt" on the parcel, but from May 1980 Marvin had no substantial contact with the real estate. In October 1980 Commonwealth, by written agreement, sold 40 of the 67 Stettinger acres to Landco, Inc. S.E. Copple, Marvin, and Commonwealth had no proprietary interest in Landco, which agreed to purchase 131 lots on the former Stettinger tract at a price of $12,500 per lot, or a total price of $1,637,500, after Commonwealth had certified the lots as "buildable." The Landco agreement had an "escape" clause, namely, if Landco was unable or unwilling to purchase the real estate, Commonwealth's sole and exclusive remedy was retention of $1,000 as earnest money paid to Commonwealth by Landco at signing the agreement. The Landco agreement was not entered on Commonwealth's books until January 1981, when S.E. Copple directed that the Landco transaction be entered to show an account receivable in the amount of $1,637,500.

On January 15, 1981, Marvin received a check for $250,000 from Commonwealth, a payment of a "commission" regarding the Stettinger transaction but not authorized by Commonwealth's directors. Between February 17 and March 24, during an annual examination of Commonwealth, bank examiners told S.E. Copple that the $250,000 payment to Marvin should be documented by a written agreement and

approved by Commonwealth's directors. On March 19 S.E. Copple directed that an "adjusted projected gain" be shown on Commonwealth's books regarding the Landco agreement, namely, $746,924. Another Commonwealth check for $250,000 was issued to Marvin Copple on April 2 as payment of a "commission" regarding the Stettinger property. Marvin cashed both checks and reported those receipts on his income tax return for 1981. Those two checks, each for $250,000 as a "commission," are the basis for the thefts alleged in the information filed against Marvin Copple.

The State called several witnesses who testified about transactions associated with Commonwealth's purchase from Stettingers, the Landco agreement, and the method by which transactions were reflected on Commonwealth's books.

Steve Hull, a certified public accountant, testified that the Commonwealth-Landco agreement was not properly recorded on Commonwealth's books, because the anticipated profit on that transaction was not consistent with generally accepted accounting principles. According to Hull, the anticipated profit on the Landco transaction was too remote. In Hull's opinion the only profit which could properly be shown on Commonwealth's books was Landco's $1,000 payment of earnest money.

Ray Hill, city planner for Lincoln, testified about the number of vacant lots on December 31, 1979, near the Stettinger tract purchased by Commonwealth. In 16 developments examined by Hill, the number of vacant lots ranged between 9 percent and 100 percent. Of 1,935 lots in the vicinity of the Stettinger tract, 1,205, or 62 percent, were vacant.

Richard Keith, vice president of a real estate appraisal and consulting firm which rendered financial analyses of subdivisions in Lincoln, conducted a financial analysis of the Stettinger land at February 1, 1980. In his opinion Keith concluded that Commonwealth's proposed development of the Stettinger property was not financially feasible in view of the $500,000 payment to Marvin Copple, because cash-flow on the Stettinger tract showed a net loss exceeding $55,000. Keith also testified that the fair market value of the Stettinger tract on

February 1, 1980, was $600,000.

John Maenner, a licensed realtor and real estate developer from Omaha, testified that, in the real estate development industry on February 1, 1980, profits customarily were not paid at commencement of a development, but were paid when earned during the course of a subdivision's development.

Richard Obert, president of a mortgage banking and real estate financing company, testified that, in accordance with custom and usage throughout the industry in 1980 and 1981, a developer took his share of profits at or near the completion of a land development project. Obert also testified that, throughout the industry, a financial institution's officer or director would not compete directly with that financial institution, and if an officer or director had a business opportunity in an area of business normally conducted by the financial institution, the officer or director had the obligation to turn the property over to the institution and would then receive incentive compensation or a bonus after the institution had received any profit from the opportunity relinquished by the officer or director.

During direct examination of S.E. Copple, called as a State's witness, the prosecutor asked whether S.E. Copple had informed Commonwealth's board of directors about purchase of the Stettinger property and payment of $500,000 to Marvin Copple. On the basis of relevance Marvin Copple objected, and a bench conference was held out of the jury's hearing. In the course of that conference, the court remarked to Marvin Copple's counsel: "You haven't made an objection as to hearsay." Marvin Copple's attorney responded: "Hearsay objection, Your Honor, that would be my objection as long as we're here at the side bar." The court and counsel meticulously reviewed evidence adduced to that point in the trial, and the court concluded that the State had shown a prima facie case that a conspiracy existed between S.E. Copple and Marvin Copple. The court then overruled Marvin's objections, and S.E. Copple testified that he had never informed Commonwealth's board of directors about the agreement to pay Marvin $500,000 in connection with the Stettinger property. S.E. Copple also testified that there was no record of

any directors' meeting reflecting the prospective purchase of Stettinger's property and payment of $500,000 to Marvin.

Copple alleges his conviction is invalid, because: (1) Section 28-511(1) is unconstitutional as an overbroad or vague statute; (2) The trial court should have dismissed the proceedings on account of the State's violation of its agreement concerning information to be used in prosecution of Copple; (3) S.E. Copple's testimony about his withholding information from Commonwealth's board of directors was inadmissible because a conspiracy had not been established to authorize admission of such testimony; (4) The trial court improperly admitted into evidence irrelevant testimony and testimony in the form of an opinion from a person who did not qualify as an expert witness; (5) There was misconduct by the prosecutor; (6) There were erroneous instructions to the jury; and (7) The trial court failed to grant a mistrial.

CONSTITUTIONALITY OF § 28-511

Copple asserts that § 28-511 is unconstitutional because that statute is overbroad and vague in violation of the due process clauses of the U.S. Constitution and the Nebraska Constitution. The State argues that Copple lacks standing to challenge constitutionality of § 28-511.

Section 28-511 states in pertinent part: "(1) A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof."

We note that "vagueness" is a constitutional vice conceptually distinct from "overbreadth." An overbroad statute need lack neither clarity nor precision, and a vague statute need not reach constitutionally protected activity. See *State v. Sinica*, 220 Neb. 792, 372 N.W.2d 445 (1985) (citing L. Tribe, American Constitutional Law § 12-28 (1978)). We have stated that a statute may be constitutionally infirm if the statute is vague or overbroad. *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216 (1984). "Moreover, an enactment which is clear and precise, and therefore not vague, may nonetheless fail to pass constitutional muster by virtue of being overbroad in the sense that it prohibits the exercise of constitutionally protected

conduct, such as the exercise of first amendment rights." 218 Neb. at 561, 357 N.W.2d at 218-19. In *State v. Frey, supra*, we enunciated the standard to determine whether a party has standing to bring a constitutional challenge based on a statute's overbreadth or vagueness:

> [I]n a facial challenge to the overbreadth and vagueness of a law, that is, in this context, a claim that the law is invalid in toto and therefore incapable of any valid application, our first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. We are to then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, uphold the challenge only if the enactment is impermissibly vague in all its applications. In order to have standing to challenge a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of the law as applied to the conduct of others.

218 Neb. at 561-62, 357 N.W.2d at 219.

Irrespective of standing to challenge a statute for vagueness, an individual may have standing to assert that a statute is overbroad when such statute reaches a substantial amount of constitutionally protected conduct. See *State v. Sinica, supra*. In determining whether standing exists for a facial challenge to a statute as overbroad, a court must first determine whether the statute reaches a substantial amount of constitutionally protected conduct. *State v. Sinica, supra; State v. Frey, supra; State v. Groves*, 219 Neb. 382, 363 N.W.2d 507 (1985). If the statutory proscription does not reach a substantial amount of constitutionally protected conduct, there is no standing to challenge a statute on the basis that the statute is overbroad, and such challenge must fail. *State v. Frey, supra; State v. Groves, supra; State v. Merithew*, 220 Neb. 530, 371 N.W.2d 110 (1985). Copple argues that his conduct, as a business transaction wherein he received payment for transfer of his right to purchase and develop real estate or was paid a commission concerning a land transaction, is constitutionally

protected. The liberty to contract, the right to acquire and sell property in a lawful manner, and the right to conduct lawful business are constitutionally protected rights. See, *United States Brewers' Assn., Inc. v. State*, 192 Neb. 328, 220 N.W.2d 544 (1974); *Gillette Dairy, Inc. v. Nebraska Dairy Products Board*, 192 Neb. 89, 219 N.W.2d 214 (1974); *Skag-Way Department Stores, Inc. v. City of Grand Island*, 176 Neb. 169, 125 N.W.2d 529 (1964); *Boomer v. Olsen*, 143 Neb. 579, 10 N.W.2d 507 (1943); *Nelsen v. Tilley*, 137 Neb. 327, 289 N.W. 388 (1939). Consequently, we find that § 28-511(1) does reach a substantial amount of constitutionally protected conduct, and, therefore, Copple does have standing to challenge § 28-511(1) for overbreadth as that statute applies to his transactions with Commonwealth.

Copple argues that § 28-511(1) does not contain the word *unlawfully* as a modifier for *takes*, used in the statute, and, therefore, all conduct, both legal and illegal, falls within the prohibition of the statute and is "swept together in one net." Brief for Appellant at 24. We disagree with Copple's assertion that absence of "unlawfully" renders § 28-511(1) unconstitutionally overbroad. Section 28-511(1) proscribes or condemns only that conduct in which criminal intent is present, distinguishing theft from activity which is otherwise permissible as noncriminal conduct. Under § 28-511(1) the prohibited taking or exercising control relates to "movable property of another with the intent to deprive him or her thereof." Such statutory prohibition of § 28-511(1) must be read with other pertinent parts of the Nebraska Criminal Code. Neb. Rev. Stat. § 28-509 (Reissue 1985), the definitional statute pertaining to the crime of theft, in pertinent part provides:

> (1) Deprive shall mean:
>
> (a) To withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or
>
> (b) To dispose of the property of another so as to create a substantial risk that the owner will not recover it in the condition it was when the actor obtained it;
>
> . . . .

> (6) Property of another shall mean property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. . . .

Also, § 28-511(1) must be read with Neb. Rev. Stat. § 28-510 (Reissue 1985): "Conduct denominated theft in sections 28-509 to 28-518 constitutes a single offense embracing the separated offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like." Section 28-511(1), when read with §§ 28-509 and 28-510, clearly condemns only conduct in which criminal intent is present and does not condemn any conduct where criminal intent is absent. Of further interest is Neb. Rev. Stat. § 28-518 (Reissue 1985), which defines the grade of various offenses classified as theft, especially subsection (1) of § 28-518: "Theft constitutes a Class III felony when the value of the thing involved is over one thousand dollars." Section 28-518 then distinguishes other grades of theft, ranging from a Class IV felony to a Class II misdemeanor, depending on the "value of the thing involved." See § 28-518(2), (3), and (4). The designation of theft as either a felony or a misdemeanor denotes unlawful conduct. Copple does not indicate any provision in the Nebraska Criminal Code which recognizes a lawful felony or a lawful misdemeanor. We suspect there is probably none. We find that the provisions of § 28-511, when read with §§ 28-509 and 28-510, clearly distinguish unlawful or criminal conduct from conduct which is lawful. Therefore, § 28-511(1) is not unconstitutionally overbroad.

We turn to Copple's contention that § 28-511(1) is vague and, therefore, unconstitutional. To challenge § 28-511(1) on the ground of vagueness, Copple must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others. See *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216

(1984). Rather, Copple is entitled to show that the statute, when applied to his particular activity, is vague. We cannot state that business activity involving payment of a commission or for disposition of a right to purchase and develop real estate is clearly proscribed by § 28-511(1). Therefore, Copple does have standing to challenge § 28-511(1) on the ground of vagueness insofar as that statute condemns Copple's conduct as criminal.

> In order to meet constitutional standards of due process, a penal statute must be sufficiently clear so that a person of ordinary intelligence has fair notice of what exactly is forbidden conduct under the act. . . . [I]n construing a penal statute this court will give it an interpretation which meets constitutional requirements if it can reasonably be done. . . . A statute is presumed to be constitutional and unconstitutionality must be clearly established before this court is authorized to declare it void.

State v. Neal, 187 Neb. 413, 416, 191 N.W.2d 458, 460 (1971).

In *State v. Sailors*, 217 Neb. 693, 695, 352 N.W.2d 860, 862 (1984), this court stated:

> The test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . . A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding. . . . In determining whether a statute is vague and therefore does not give a defendant adequate notice that his conduct is proscribed, the statute must be examined in light of the conduct with which the defendant is charged. . . .
>
> . . . The prohibition against vagueness does not invalidate a statute simply because it could have been drafted with greater precision. The test is whether the defendant could reasonably understand that his conduct was proscribed by the statute.

As was the basis for his claim that § 28-511(1) is overbroad as the result of "unlawfully" being absent from the statute, Copple contends that § 28-511(1) is vague because the word *unlawfully* is not contained in the body of the questioned

statute. We again disagree with Copple and find that § 28-511(1) is not unconstitutionally vague. Section 28-511(1) employs ordinary language which is found in common usage, easily understood by a person of ordinary intelligence. The term "theft" is commonly used and understood to mean the act of stealing. "Deprive" is another commonly used word and is adequately defined in § 28-509(1). The phrase "property of another" can hardly be misunderstood, especially in view of the definition expressed in § 28-509(6). An essential purpose of a penal statute is to provide notice to the ordinary person concerning conduct which is proscribed as criminal. *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986). When a penal statute supplies an ordinary person with notice concerning conduct forbidden as criminal, such statute meets the constitutional standard of due process. See *State v. Neal, supra*. Apparently Copple views the Nebraska Criminal Code as absolutely unrelated statutes which, by design or chance, have been collected in chapter 28 of the Revised Statutes of Nebraska. However, the Nebraska Criminal Code is a systematic statutory statement, defining criminal offenses and prescribing penalties for commission of crimes. All facets of a criminal offense need not be embodied in one statute and that statute alone. Characteristic elements of some, but not all, criminal offenses are specified in a statute within the Nebraska Criminal Code, while another statute within the code may specify a meaning assigned to certain elements of a particular crime, and still other statutes prescribe penalties which may be imposed on conviction of a criminal offense. The result is a statutory synergism, supplying information to the ordinary person about conduct condemned as criminal and punishable in a prescribed form. The statutes contained in the Nebraska Criminal Code no more exist in individual isolation than do the people governed by that code. To an ordinary person, § 28-511(1) supplies fair notice concerning conduct which is condemned as criminal and, therefore, prohibited by the Nebraska Criminal Code. If Marvin Copple intended to deprive Commonwealth of its property, then § 28-511(1) provided adequate and clear notice that Copple's contemplated conduct was forbidden as a criminal act. The question whether

Copple had such criminal intent was, of course, for the jury's determination. *State v. Siers*, 197 Neb. 51, 248 N.W.2d 1 (1976) (intent as an essential issue and question of fact for the jury in an embezzlement trial). See, also, *Escher v. State*, 140 Neb. 633, 1 N.W.2d 322 (1941) (felonious intent regarding a conspiracy to embezzle corporate funds, "looting" the corporation; fact question for jury).

We hold that § 28-511(1) is neither overbroad nor vague and is, therefore, constitutional.

KASTIGAR HEARING

Copple claims the proceedings should have been dismissed because the State used evidence obtained, directly or indirectly, from Copple's information supplied pursuant to the agreement of May 10, 1984.

To support his claim, Copple relies on *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972), where the U.S. Supreme Court considered the question whether the U.S. government can compel testimony from an unwilling witness who has invoked the fifth amendment privilege against compulsory self-incrimination after the government had obtained immunity for such witness pursuant to 18 U.S.C. §§ 6002 and 6003 (1982). The *Kastigar* Court reasoned:

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." . . . This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

406 U.S. at 460.

The Nebraska counterpart to 18 U.S.C. §§ 6002 and 6003 is Neb. Rev. Stat. § 29-2011.02 (Reissue 1985):

> Whenever a witness refuses, on the basis of the privilege against self-incrimination, to testify or to provide other

> information in a criminal proceeding before a court or grand jury, the court, on motion of the county attorney or other prosecuting attorney, may order the witness to testify or to provide other information. The witness may not refuse to comply with such an order of the court on the basis of the privilege against self-incrimination, but no testimony or other information compelled under the court's order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case, except in a prosecution for perjury, giving a false statement, or failing to comply with the order of the court.

Copple also relies on *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982), where this court construed § 29-2011.02 and expressed: "It is clear that immunity statutes are designed to serve as substitutes for the fifth amendment right not to incriminate oneself. Without such statutes no person in a criminal case can constitutionally be compelled to testify." 213 Neb. at 13, 328 N.W.2d at 174.

Copple has misplaced reliance on *Kastigar v. United States, supra*, and *State v. Jones, supra*, which involve statutorily granted immunity. In Copple's case there has been no privilege against self-incrimination invoked by Copple during a criminal proceeding before a court or grand jury. Copple was not judicially compelled to testify but, rather, voluntarily bargained for and entered into an agreement with the State. As observed in *Butler v. State*, 55 Md. App. 409, 418, 462 A.2d 1230, 1234 (1983):

> We should meticulously keep separate and apart the subjects of (1) the conferral of immunity, (2) a plea bargain, and (3) some other bargain involving something other than a plea to a criminal charge. The sources of authority are different. The social purposes are different. The legal incidents are different. The procedural rules are different. Other than the very general notion of some "*quid pro quo*," the three phenomena are distinct. We only do the law a disservice when we heedlessly blur those distinctions.
>
> The conferral of immunity, which involves no

> bargaining, is further removed conceptually from the two types of bargains than they are from each other. To compare immunity to bargaining is truly to compare apples with oranges . . . .

However, the absence of statutorily granted immunity does not mean that the State is exempt from compliance with its agreement regarding immunity and restricted evidence or information.

In *Rowe v. Griffin*, 676 F.2d 524, 527-28 (11th Cir. 1982), the court said:

> We note that, under the self-incrimination clause of the fifth amendment, evidence of guilt induced by a government promise of immunity is "coerced" evidence and may not be used against the accused. [Citation omitted.] For purposes of compelling testimony which otherwise would be privileged by the fifth amendment, all that is constitutionally required is a grant of use immunity. [Citation omitted.] . . . We believe that, as a matter of fair conduct, the government ought to be required to honor such an agreement when it appears from the record that: (1) an agreement was made; (2) the defendant has performed on his side; and (3) the subsequent prosecution is directly related to offenses in which the defendant, pursuant to the agreement, either assisted with the investigation or testified for the government.

As stated in *United States v. Carpenter*, 611 F. Supp. 768, 774-75 (N.D. Ga. 1985):

> However, the courts have developed a concept of "nonstatutory" immunity whereby the courts will enforce informal or procedurally flawed grants of immunity on equitable grounds. . . . These cases indicate that where the government has entered into an agreement with a prospective defendant and the defendant has acted to his detriment or prejudice in reliance upon the agreement, "as a matter of fair conduct, the government ought to be required to honor such an agreement." [Citing *Rowe v. Griffin, supra*.]

At the hearing on Copple's motion to suppress, the State presented evidence from the special prosecutor who had signed

the May 10 agreement and an officer of the Lincoln Police Department assigned to investigate Commonwealth matters. According to the officer, he was one of four officers who investigated Commonwealth's insolvency. The investigators familiarized themselves with the accounting system utilized by Commonwealth and discussed the system with Commonwealth's comptroller. The investigative task force also subpoenaed Marvin Copple's checking accounts for information pertaining to the Stettinger transaction. The foregoing investigative activity occurred in December 1983 and January 1984, months before Copple signed the agreement with the governments. At a preliminary hearing on February 14, 1984, Copple testified in his own behalf and offered an explanation for the "commission" checks received from Commonwealth. Before Copple signed the agreement of May 10, the State had acquired considerable information regarding various aspects of real estate development. No representative of the State discussed the Stettinger transaction with Marvin Copple.

Under the circumstances, we find that a *Kastigar*-type hearing was not required because there was no statutorily granted immunity as a consequence of judicially compelled testimony, but, at the hearing on Copple's motion to suppress, the district court properly considered the question whether the State had violated its agreement with Copple concerning immunity and restricted evidence. However, we hold that, at such hearing to determine whether the State had violated its agreement for immunity and restricted evidence or information, the State must present a prima facie case that it has fulfilled its agreement with the defendant, that is, demonstrate that the State's evidence, to be adduced at the defendant's trial, was obtained from a source or sources independent of the defendant and not by direct or indirect use of information obtained from the defendant as the result of the defendant's agreement for immunity and restricted evidence or information. In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682

(1986). See, also, *State v. Beard*, 221 Neb. 891, 381 N.W.2d 170 (1986). "In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the 'trier of fact' and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress." *State v. Dixon, supra* at 795, 387 N.W.2d at 687. The district court's decision, overruling Copple's motion to suppress, is correct.

TESTIMONY FROM A COCONSPIRATOR

As defined in the Nebraska Criminal Code:

> (1) A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:
>
> (a) He agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and
>
> (b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

Neb. Rev. Stat. § 28-202 (Reissue 1985).

However, the information did not allege a conspiracy in violation of § 28-202, but alleged two counts of theft in violation of § 28-511(1).

Marvin Copple contends S.E. Copple's testimony is inadmissible for two reasons, namely, the testimony violated the hearsay rule and was not relevant.

> (1) A statement is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by him as an assertion;
>
> . . . .
>
> (3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted; and
>
> (4) A statement is not hearsay if:
>
> . . . .
>
> (b) The statement is offered against a party and is . . . (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Neb. Evid. R. 801 (Neb. Rev. Stat. § 27-801 (Reissue 1985)).

Conceal means to hide, secrete, or withhold from knowledge of others; to withhold from utterance or declaration; to cover or keep from sight; to hide or withdraw from observation, cover or keep from sight, or prevent discovery. *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985). The word *conceal* pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact and has reference to some advantage to the concealing party or a disadvantage to some interested party from whom the fact is withheld. *Christopher v. Evans, supra.*

S.E. Copple's testimony related to his nonverbal conduct in or the act of concealing information from Commonwealth's board of directors in reference to the Stettinger transaction and payments to Marvin. S.E. Copple's nonverbal conduct was not a declaration asserting or demonstrating that a fact was true. Rather, the testimony was evidence of S.E. Copple's deliberate withholding of information for Commonwealth's directors and was not an out-of-court statement offered to prove the truth of the matter asserted. Because the statements of S.E. Copple were made during his testimony at trial and did not have the characteristics of hearsay, the court correctly overruled Marvin's objection (hearsay).

This brings us to Marvin's contention that S.E. Copple's testimony was not relevant.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1985)).

"The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another." *Hahn & Hupf Constr. v. Highland Heights Nsg. Home*, 222 Neb. 189, 194, 382 N.W.2d 607, 611 (1986). The very nature of a conspiracy requires an element of intent. *United States v. Adderly*, 529 F.2d 1178 (5th Cir. 1976).

Frequently, a conspiracy involves intricate situations and several complex acts which make it difficult to establish, by

direct proof, a conspiracy or conspiratorial intent. Thus, circumstantial evidence may establish existence of a conspiracy or the criminal intent necessary for a conspiracy. See, *State v. McSwain*, 194 Neb. 31, 229 N.W.2d 562 (1975); *State v. Adams*, 181 Neb. 75, 147 N.W.2d 144 (1966).

When a conspiracy has been proved, a conspirator's acts and declarations, in furtherance of the conspiracy, are the acts and declarations of all conspirators and are admissible evidence against the coconspirators. *State v. Adams, supra.* See, also, *State v. Watson*, 182 Neb. 692, 157 N.W.2d 156 (1968). Judge Learned Hand observed: "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime.' What one does pursuant to their common purpose, all do . . . ." *Van Riper v. United States*, 13 F.2d 961, 967 (2d Cir. 1926).

As we have already noted, a criminal conspiracy requires an "overt act." § 28-202(1)(b). An overt act manifests that a conspiracy is "still at work." *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982). Also, an overt act, as something done pursuant to a conspiracy, tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. See *State v. John, supra.* An overt act, by itself, need not have the capacity to accomplish the conspiratorial objective and does not have to be a criminal act. See *State v. John, supra.* Silence, which is designed to conceal, may indicate an intention to conspire and, if intended to facilitate the conspiracy, may be an overt act pursuant to the conspiracy. See *United States v. Eucker*, 532 F.2d 249 (2d Cir. 1976).

In *State v. Bobo*, 198 Neb. 551, 253 N.W.2d 857 (1977), the focal point was a coconspirator's hearsay statement and admissibility of such statement under the coconspirator exception to the hearsay rule, that is, admissibility pursuant to Neb. Evid. R. 801(4)(b)(v). In *Bobo* this court stated:

> To be admissible, the statements of the coconspirator must have been made while the conspiracy was pending and in furtherance of its objects; and if the statements took place after the conspiracy had ended, or if merely narrative of past occurrences, they are not admissible. [Citations omitted.] The coconspirator exception to the hearsay rule

> is applicable regardless of whether a conspiracy has been charged in the information or not. [Citation omitted.]
>
> The rule is well established that before the trier of facts may consider testimony under the coconspirator exception to the hearsay rule, a *prima facie* case establishing the existence of the conspiracy must be shown by independent evidence. [Citations omitted.]

(Emphasis supplied.) 198 Neb. at 557, 253 N.W.2d at 861.

Although the coconspirator exception to the hearsay rule is not a determinative issue in Copple's case, we believe the requirement of a "prima facie case," contained in *Bobo* for admissibility of a statement by a coconspirator, is pertinent to the evidential question now before this court: whether S.E. Copple's testimony was admissible as relevant evidence.

The phrase *prima facie* "can probably be defined only in terms of sufficient evidence to permit the trial court reasonably to infer that there existed a conspiracy." *State v. Thompson*, 273 Minn. 1, 17, 139 N.W.2d 490, 503 (1966). See, also, *State v. Daniels*, 380 N.W.2d 777 (Minn. 1986). In *United States v. Trotter*, 529 F.2d 806, 812 n.8 (3d Cir. 1976), a prosecution for conspiracy, the court stated:

> The requirement of prima facie proof is less stringent than that of a preponderance of the evidence. The former requires only enough evidence to take the question to the jury whereas the latter requires "proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence." McCormick, *Evidence* 794 (2d ed. 1972).

We now hold that for admission of a coconspirator's act as evidence against a defendant-coconspirator being tried for a crime other than the conspiracy itself, the trial court must first determine whether the State has proved a prima facie case that (1) a conspiracy existed, (2) the defendant and the witness were members of the conspiracy, and (3) the witness' act was done during and in furtherance of the conspiracy.

We emphasize, however, that there is a distinction between proving conspiracy as a crime, see § 28-202, where proof beyond a reasonable doubt is required, and establishing conspiracy as a prerequisite and a means to achieve admission

of an alleged coconspirator's acts and declarations as evidence, where only a prima facie showing of conspiracy is sufficient.

> The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth, (b) avoid needless consumption of time, and (c) protect witnesses from harassment or undue embarassment [sic].

Neb. Evid. R. 611 (Neb. Rev. Stat. § 27-611(1) (Reissue 1985)).

Nevertheless, whether the State has established a prima facie case of conspiracy, thereby constituting anything within execution or furtherance of the common purpose as the act of every coconspirator, is a preliminary question for the trial court concerning admissibility of evidence. See Neb. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)). Rule 104(1) was the procedure correctly utilized by the trial court in Copple's case. Presentation of the State's evidence in Copple's case consumed 13 days of trial and is spread over 2,563 of the 3,058 pages of testimony contained in a bill of exceptions consisting of 14 volumes, excluding pretrial and posttrial matters. To adduce that quantity of evidence outside a jury's presence and then require repetition of the same admissible testimony before the jury would unduly and unnecessarily prolong what was already a lengthy trial, as cases involving conspiracy are likely to be. Consequently, the prima facie case of conspiracy may be established as a part of and through the evidence presented to the jury concerning the substantive crime charged against the coconspirator-defendant. We have characterized proof of a prima facie case of conspiracy as a preliminary question for the trial court under Neb. Evid. R. 104(1) and a prerequisite for admissibility of a coconspirator's acts, rather than making relevance depend on proof of another fact to be later established during adduction of evidence, a "connecting up," as authorized by Neb. Evid. R. 104(2), which states: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Admission of evidence from a coconspirator, subject to the State's later completing proof of a

prima facie case of conspiracy, presents some procedural problems which may result in unwarranted, or even unfair, prejudice to a defendant, for example, the necessity of a motion to strike evidence conditionally received, a request to withdraw the coconspirator's testimony from consideration by the jury, or an instruction that the jury shall disregard the evidence which has been presented but not linked to a conspiracy. Whatever procedure might seem most appropriate on failure of proof after a conditional admission of evidence, there is an ever-present risk that the court's later instruction may not erase a prejudicial impression on the jury—with the specter of a mistrial. See McCormick on Evidence § 58 (E. Cleary 3d ed. 1984).

At the point in the trial where the State sought introduction of S.E. Copple's testimony about his concealment of or withholding information from Commonwealth's board of directors, there was evidence as follows: S.E. Copple and Marvin were directors and officers of Commonwealth and had reached an agreement in January 1980 regarding Commonwealth's acquisition of the Stettinger real estate, including $500,000 to be paid to Marvin. Marvin's claim on the Stettinger property was, at best, based on an oral contract, and there were no documents embodying any agreement between S.E. Copple and Marvin. Stettinger's property had a market value of $600,000 at the time of sale to Commonwealth on February 1, 1980. Commonwealth's payments to Marvin, that is, the two checks of $250,000 each, were made to Marvin in January and April of 1981. Marvin had minimal contact with the Stettinger property after its acquisition by Commonwealth. The size of the payment to Marvin ($500,000) in relation to the market value of the Stettinger property ($600,000) was an additional circumstance. Finally, there was the collapse of Commonwealth in November 1983, which marked the outer boundary of the conduct contended by the State to be conspiratorial. A trial court's finding that a prima facie case has been established concerning existence of a conspiracy will be upheld unless such finding is clearly erroneous. Cf. *United States v. Posner*, 764 F.2d 1535, 1537 (11th Cir. 1985) (trial court's determination is a "finding of fact which may be

overturned only if clearly erroneous"). Cf., also, *United States v. Arruda,* 715 F.2d 671, 684 (1st Cir. 1983) (in reviewing a trial court's ruling on the showing made by the government for evidence from a coconspirator, "we must accept that court's findings of fact supporting the ruling unless they are clearly erroneous"). In Copple's case there is evidence which supports the district court's finding that the State had established a prima facie case that a conspiracy existed between S.E. Copple and Marvin. The district court's finding of a prima facie case of conspiracy is correct.

When the State established its prima facie case of conspiracy, evidence of S.E. Copple's concealment or withholding information from Commonwealth's board of directors was circumstantial evidence for the jury's consideration in determining whether Marvin Copple, as S.E. Copple's coconspirator, was guilty of theft as charged. See Neb. Evid. R. 401. The admission or exclusion of evidence is a matter within the sound discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion. *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986). There is no abuse of discretion in the district court's admitting S.E. Copple's testimony as evidence against Marvin.

RELEVANT EVIDENCE AND TESTIMONY BY EXPERTS

Copple believes that the district court committed reversible error by admitting testimony of Ray Hill, Richard Keith, Richard Obert, and John Maenner, contending that testimony from those witnesses was not relevant.

Hill testified about the weakened condition of the Lincoln real estate market in terms of available vacant lots. Keith expressed his opinion concerning the market value of the Stettinger land and the feasibility of its development. Obert and Maenner testified about the customary manner in which a developer was paid for any profit realized on a real estate development. All that testimony has some tendency to establish the fact that the payments to Marvin Copple were, more probably, subterfuge to siphon funds from Commonwealth and

were thefts rather than earned commissions or profits from a legitimate real estate transaction. Such testimony was relevant and admissible. See Neb. Evid. R. 401. The district court did not abuse its discretion in admitting testimony from the witnesses mentioned. See *State v. Bostwick, supra.*

Next, Copple complains that neither Obert nor Maenner was qualified to testify as an expert witness.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Neb. Evid. R. 702 (Neb. Rev. Stat. § 27-702 (Reissue 1985)).

Obert was a graduate accountant, actively engaged in the mortgage banking business and financing for real estate developers. Maenner held a degree in business administration, was a licensed realtor in Nebraska and two other states, and was engaged in the real estate "subdivision development business." Whether a witness is qualified as an expert is a preliminary question for a trial court. Neb. Evid. R. 104(1). Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion. See *Schmidt v. J.C. Robinson Seed Co.*, 220 Neb. 344, 370 N.W.2d 103 (1985). We find no abuse of discretion by the district court in its determination that Obert and Maenner were qualified as expert witnesses.

Copple alludes to other possible errors concerning the trial court's ruling on some of his objections, which we find are at least 593 in number, but does not specify which rulings prejudicially affected any substantial right of Copple. See Neb. Evid. R. 103(1) (Neb. Rev. Stat. § 27-103(1) (Reissue 1985)). In order that assignments of error as to the admission or rejection of evidence may be considered, the Supreme Court requires that appropriate reference be made to the specific evidence against which objection is urged. *Pulliam v. State*, 167 Neb. 614, 94 N.W.2d 51 (1959). "A party who claims error in a proceeding is required to point out the factual and legal basis that shows the error." *Lemmon v. State*, 173 Neb. 387, 391, 113

N.W.2d 525, 528 (1962). We will not speculate about which rulings of the district court Copple contends are erroneous. See *Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985). See, also, *Fee v. Fee*, 223 Neb. 128, 134, 388 N.W.2d 122, 126 (1986) ("To be considered by this court, errors must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred. See Neb. Ct. R. of Prac. 9D(1)d (rev. 1983)").

INSTRUCTIONS

Copple argues that instruction No. 12 is erroneous because the instruction does not define "bona fide or honest claim of right." Brief for Appellant at 44. However, at the conference on prospective jury instructions, Copple's attorney expressly stated that "[d]efendant has no objection to [instruction No.] 12." "We have frequently held that the failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal." *State v. Pope*, 211 Neb. 425, 433, 318 N.W.2d 883, 887 (1982). See, also, *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981); *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981).

Copple also contends that the court erred in giving instruction No. 11:

> A director of a corporation shall perform his or her duties as a director in good faith, in a manner he or she reasonably believes to be in the best interest of the corporation and with such care as an ordinary and prudent person in a like position would use under the same or similar circumstances.
>
> A director or other corporate officer has a fiduciary duty not to acquire an interest adverse to that of the corporation while acting for the corporation or when dealing individually with third persons.

Copple argues that instruction No. 11 provides a civil standard for determination of negligence, which is inapplicable in a criminal case. However, as a proper instruction in a criminal case, this court has upheld use of a jury instruction based on the civil law pertaining to a fiduciary's duty. In *State v. Siers*, 197 Neb. 51, 248 N.W.2d 1 (1976), the defendant was charged with embezzling funds of investors in a limited

partnership in which the defendant was a partner. In *Siers* this court reasoned that, since the defense was predicated on an absence of intent to embezzle, the instruction on fiduciary duties, otherwise applicable in a civil case, was proper to guide the jury's determination regarding the presence or absence of criminal intent. Copple has raised a similar defense in this case: absence of criminal intent in his receipt of funds from Commonwealth. Consequently, we find that instruction No. 11 was proper under the circumstances of this case.

Copple raises several other questions concerning the adequacy of various definitions contained in instruction No. 10. The gist of Copple's complaint is that instruction No. 10 does not contain adequate definitions.

> Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. . . . " ' "All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error." ' "

(Citations omitted.) *State v. Dondlinger*, 222 Neb. 741, 749, 386 N.W.2d 866, 871-72 (1986). See, also, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). We find that Copple's contentions are without merit and that the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues. We find that the jury was properly instructed.

MISCONDUCT BY PROSECUTOR

In view of his numerous and repeated objections, Copple contends that a prejudicial impression was created regarding the jury, thereby denying him a fair trial. As this court reasoned in *State v. Ross*, 220 Neb. 843, 845-46, 374 N.W.2d 228, 230 (1985):

> While the granting of a mistrial is within the discretion of the trial court, "Before it is necessary to grant a mistrial

> due to prosecutorial misconduct, the defendant must show that a 'substantial miscarriage of justice has actually occurred.' " . . . Furthermore, Neb. Rev. Stat. § 29-2308 (Cum. Supp. 1984) provides that "[n]o judgment shall be set aside, or new trial granted . . . for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."
>
> The defendant has failed to show a substantial miscarriage of justice. As this court has stated previously, "Although the prosecutor was less than artful at times, it does not appear that his conduct was meant to, or did, inflame the prejudices or excite the passions of the jury against the defendant." *State v. Tiff*, 199 Neb. 519, 529, 260 N.W.2d 296, 302 (1977).

We find that the reasoning of *State v. Ross, supra*, disposes of Copple's complaint about the prosecutor's conduct in relation to the matter of objections, inasmuch as Copple has failed to show that the frequency of his objections resulted in substantial prejudice or a miscarriage of justice. See Neb. Rev. Stat. § 29-2308 (Reissue 1985). Copple suggests another aspect of misconduct by the prosecutor—a member of the county attorney's office testified at a committee hearing of the Nebraska Legislature regarding possible amendment of § 28-511(1). How that fact caused unfair prejudice to Copple in his trial is problematic to the point of frivolousness and deserves no further comment. There was no prosecutory misconduct.

DENIAL OF MISTRIAL

Copple's final assignment of error relates to the district court's refusal to grant a mistrial. Although such refusal by the district court is assigned as error, in his brief Copple does not give a reason or explanation that any one or all of his 20 motions for mistrial were incorrectly refused by the district court. As stated in *Bohaty v. Briard*, 219 Neb. 42, 46, 361 N.W.2d 502, 505 (1985):

> Because the assignments of error are not supported by accompanying argument in the briefs, but are mere

statements of general dissatisfaction with conclusions reached by the trial court, we will not speculate about the reasoning behind dissatisfaction of the parties. Without argument and authority in support of an advocated position, speculation is unavoidable.

AFFIRMED.

SUSAN M. BOHANNON, APPELLANT, V. GUARDSMAN LIFE INSURANCE COMPANY, AN IOWA CORPORATION, APPELLEE.
400 N.W.2d 856

Filed February 13, 1987. No. 85-648.

1. **Summary Judgment.** The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment. Those requirements are that there be no genuine issue of material fact, nor any genuine issue regarding the ultimate inferences to be drawn therefrom, and that the moving party is entitled to judgment as a matter of law.
2. **Insurance: Waiver.** Some act or conduct amounting to a recognition of the continued validity of an insurance policy as a binding obligation upon an insurer is necessary to constitute an effective waiver of the policy provision for forfeiture for nonpayment of premiums.
3. _____: _____. An insurer, with full knowledge of the nonpayment of a monthly premium, which nevertheless demands and receives payment of the premium for the succeeding month, may have waived the policy provision for forfeiture for nonpayment of the preceding monthly premium.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded with directions.

Daniel J. Duffy and Kurt F. Tjaden of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Raymond M. Crossman, Jr., of Crossman, Norris & Hosford, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

Plaintiff appeals an order from the district court for Douglas County sustaining the defendant's motion for summary judgment and denying the plaintiff's motion for summary judgment in a suit seeking payment of the proceeds of a life insurance policy.

On October 22, 1977, the defendant issued a life insurance policy for $100,000 on the life of the decedent, plaintiff's husband, plaintiff being the beneficiary of the policy. A premium of $33.92 was payable on the 22d of each month by preauthorized check, which premium when paid covered the decedent through the 22d of the following month. The policy contained a 31-day grace period, during which time the policy remained in effect in the event a payment was not timely made.

On June 25, 1980, the decedent died. The defendant denied the plaintiff's claim for the proceeds of the policy due to an alleged lapse of the policy for nonpayment of the April 22, 1980, premium. The plaintiff brought suit against the defendant for the proceeds of the policy, but the district court sustained the defendant's motion for summary judgment and denied the plaintiff's motion for summary judgment. The plaintiff appeals.

The plaintiff asserts the district court erred in sustaining the defendant's motion for summary judgment and in denying the plaintiff's motion for summary judgment when it failed to find that (1) by accepting premiums after the alleged lapse of the policy the defendant recognized the continued validity of the policy as a binding obligation upon it, which constituted an effective waiver of forfeiture for nonpayment of premiums; (2) the defendant's acceptance of the plaintiff's tender on August 14, 1980, of the April 22 premium waived the policy provisions regulating mode of payment; and (3) an insurer which gives one reason for its conduct and decision as to a matter involving controversy cannot, after litigation has begun, defend upon another and different ground.

Before we proceed with our disposition of those issues we must set forth the guidelines we follow in cases with this procedural posture, that posture being when the lower court has denied one party's motion for summary judgment and

sustained the other party's motion for summary judgment. "The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment." *Hiram Scott College v. Insurance Co. of North America*, 187 Neb. 290, 295, 188 N.W.2d 688, 691 (1971). The requirements necessary to sustain a motion for summary judgment are the absence of any genuine issue of material fact or the absence of any genuine issue regarding the ultimate inferences to be drawn therefrom. *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985).

Because we find as a matter of law that the facts as presented constitute waiver by the defendant of any right to declare a forfeiture, we reverse the district court's order sustaining the defendant's motion for summary judgment and remand this cause with directions to enter judgment for the plaintiff.

The additional facts necessary to understand the plaintiff's first assertion of error are as follows: On April 22, 1980, the April premium was due. On that day a preauthorized check was drawn on decedent's account. On May 12 that check was returned to the defendant for insufficient funds. On May 22 the defendant sent a letter to the decedent, stating that the April premium check had been dishonored and requesting a replacement check by June 6, 1980, to keep the policy in force. On June 5 the defendant received a replacement check from the decedent. That check was deposited on June 16 and dishonored by decedent's bank on June 23, 1980. On June 25, 1980, the decedent died.

Meanwhile, on May 22, 1980, the preauthorized check for the May premium was drawn on the decedent's account. This check was deposited by the defendant on June 21 and cleared the decedent's bank on June 25, 1980. That check contained the following language: "This check when paid is a receipt for amounts due on the policies listed. The date of this check indicates the premium due month."

From these facts the plaintiff argues that by accepting the May 22 premium the defendant recognized the continued validity of the policy as a binding obligation upon it and thereby waived any right it had to declare a forfeiture for nonpayment of the April 22 premium. If the plaintiff's argument is accepted,

the May 22 premium payment would have paid the policy through June 22, and the 31-day grace period would have covered the decedent on June 25, the day of his death.

In *Tighe v. Security Nat. Life Ins. Co.*, 191 Neb. 271, 214 N.W.2d 622 (1974), we set forth what a plaintiff must show to prove a case of waiver in a situation such as this. The rule is that "some act or conduct amounting to a recognition of the continued validity of a policy as a binding obligation upon the insurer is necessary to constitute an effective waiver of policy provision for forfeiture for nonpayment of premiums." *Id.* at 275-76, 214 N.W.2d at 625.

Waiver was found in *Central American Life Ins. Co. v. Krause*, 284 S.W.2d 192 (Tex. Civ. App. 1955), a case with facts almost identical to the present case. In that case, Krause had given the insurance company authority to draw drafts on his bank for premiums due on his life insurance policy. The company drew a draft for the premium due April 18, 1953, which was returned unpaid. On May 6, 1953, the company wrote a letter to Krause advising him that the draft had been returned with the notation "account closed." The company then asked for a new draft authorization and the name of the bank with which Krause was doing business. Then, on May 8, the company deposited a draft for the premium due on May 18, which was paid on May 22, 1953. In reviewing these facts the court stated:

> It is material . . . that the appellant company knew the April 18th premium draft had been returned to it unpaid prior to May 8th when it deposited its draft for the premium due May 18th. Although appellant company could not on May 8th assert a forfeiture of the policy [because the policy contained a 30-day grace period], it was put on notice that the draft for the April 18th premium had been returned to it. This fact in conjunction with the further fact that it admittedly received the money for the May premium on May 22nd is sufficient to establish a waiver of the forfeiture of the policy due to non-payment of the April 18th premium prior to May 18th.

Id. at 194.

Although the trial court submitted the issue of waiver to the jury, the appellate court determined the facts were such that the trial court could have resolved the issue as a matter of law based solely on the company's written records. The court explained its finding of waiver as follows:

> It is a sound proposition under the record that appellant company upon the return of the draft for the April 18th premium could have withheld the drawing and deposit of the draft for the May 18th premium until it determined whether the April premium would be paid. But, with full knowledge that the April premium draft had been returned to it, the appellant drew a draft for the May premium which it deposited on May 8th.

Id.

Similarly, in the case before us, the defendant, which had notice of the April dishonor, could have withheld the drawing and deposit of the draft for the May 22 premium until it determined whether the April premium would be paid. This it did not do. By drawing the May premium before it determined whether the April premium would be paid, the defendant did an act amounting to a recognition of the continued validity of the policy as a binding obligation upon it. That act constituted an effective waiver of the right to declare a forfeiture for nonpayment of the April premium.

The defendant asserts, however, that it had a right to draw the May premium and apply it back to the overdue April premium. If one accepts that proposition, the April premium was paid, the May premium was not, and the policy lapsed on June 22, 1980, 3 days before the decedent died. We do not, however, accept that proposition.

The check drawn on May 22, 1980, contained the following language: "This check when paid is a receipt for amounts due on the policies listed. The date of this check indicates the premium due month." The defendant argues that the first sentence means it has the right to apply the May payment to the overdue April premium. This, however, ignores the only logical reason the second sentence was included on the check. That sentence can only mean that a payment drawn during a certain month is to be applied to that month's premium. See *Dickerson*

v. Equitable Life Assur. Soc., 631 F.2d 99 (8th Cir. 1980). Consequently, the May payment could not be applied to the overdue April premium, and the defendant's argument is without merit.

Because we have determined that the defendant waived its right to declare a forfeiture as a matter of law, we need not address the plaintiff's other contentions of error. Accordingly, we reverse the order of the district court sustaining the defendant's motion for summary judgment and remand this cause to the district court with directions to enter judgment sustaining plaintiff's motion for summary judgment, together with a reasonable sum as attorney fees as provided by Neb. Rev. Stat. § 44-359 (Cum. Supp. 1986). The appellee is ordered to pay to the appellant $1,000 for the services of her attorney in this court.

REVERSED AND REMANDED
WITH DIRECTIONS.

GLENN BENDER, APPELLEE, V. NORFOLK IRON & METAL COMPANY, APPELLANT.
400 N.W.2d 859

Filed February 13, 1987. No. 86-095.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation.** The right of an injured workman to receive vocational rehabilitation benefits depends upon his inability to perform work for which he has previous training and experience.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed.

Lynn A. Melson and Walter E. Zink II of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Vince Kirby, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an appeal in a proceeding under the Workers' Compensation Act. The plaintiff, Glenn Bender, was injured on October 31, 1984, while employed by the defendant, Norfolk Iron & Metal Company, as a shearer and breaker operator. While cutting metal sheets, a 700- to 800-pound section fell upon the toes of the plaintiff's right foot. It is undisputed that the accident arose out of and during the course of the plaintiff's employment. The plaintiff returned to work on April 15, 1985, as a crane operator rather than a shearer. Two weeks later, the employment relationship terminated as a result of a dispute concerning an unrelated issue.

After leaving his employment the plaintiff applied for and received unemployment compensation benefits for 3 to 4 months. During this time, the plaintiff was required to and did look for work. Plaintiff testified that he was still on crutches during this period and received no offers of employment.

After the hearing before a single judge, the plaintiff recovered an award for temporary total disability, medical and hospital expenses, and vocational rehabilitation services.

Upon rehearing, the plaintiff again recovered an award for temporary total disability, medical and hospital expenses, vocational rehabilitation services, and an attorney fee.

Both awards found that the plaintiff had been temporarily totally disabled from the date of the accident until the date of the hearing, except for the 2-week period when the plaintiff returned to work as a crane operator, and would remain temporarily totally disabled for an indefinite time.

The defendant has appealed and has assigned as error the findings that the plaintiff's present disability is causally related to the accident of October 31, 1984, and that the plaintiff is entitled to vocational rehabilitation services.

The plaintiff testified that his return to work on April 15, 1985, as a crane operator was on a trial basis until he left the company on April 29, 1985; that he continued to seek medical treatment after he went back to work; and that he was still

under medical care on the day of the rehearing and contemplated further medical treatment.

The plaintiff further testified that he could not stand on his injured foot for long periods of time because when he did so he experienced throbbing pain. He also reported occasionally experiencing a sharp pain in his foot during the night.

The plaintiff has a high school diploma and is 29 years old. He has had no training for work other than manual labor and testified that he is now unable to lift and cannot bear weight on his right foot for any extended period of time.

The plaintiff was originally treated by Dr. Charles Henkel, an orthopedic surgeon, who referred the plaintiff to Dr. Dwight Frost on June 26, 1985. Dr. Frost testified by deposition that he began treating the plaintiff on June 26. His examination of the plaintiff's foot revealed that there had been an open reduction and fusion of the joint between the knuckle of the toe and the base of the foot and that the incision over the top of the great toe was well healed. Palpation of the forefoot showed the area to be tender, and both active and passive movement of the toes was painful. Movement of the transverse and longitudinal arches was also painful. An x ray revealed the fractures of the second through fourth toes and that the great toe was healing.

Dr. Frost recommended that the plaintiff begin physical therapy, and the plaintiff was instructed to use crutches to avoid putting his weight on the right foot. An anti-inflammatory drug was prescribed.

At the next examination 3 weeks later, the plaintiff's foot was still hypersensitive and he still experienced pain when bearing weight on the right foot. Dr. Frost ordered a custom-made insert for the plaintiff's shoe, to properly support the foot and alleviate the pain. The plaintiff was instructed to continue his medication, the use of crutches, and a less intensive course of physical therapy.

The plaintiff was examined 1 week later to determine the effectiveness of the insert. Dr. Frost concluded the plaintiff was not responding to physical therapy and the insert was not providing the intended relief. Dr. Frost testified that, at that time, he "began to suspect . . . [the plaintiff] had what we call a sympathetic dystrophy, which means a reflex persistence of

pain." He further testified the plaintiff could not do much physical activity at that time, either of a "weight bearing or mobile nature, because he's handicapped both ways." Dr. Frost later testified that "the problem here has become one of this sympathetic dystrophy. And it happens to be involved with pain."

When asked to what extent the autonomic nervous system had affected the plaintiff, Dr. Frost replied, "I think it perpetuates his pain." His prognosis for recovery was "fair to good, depending upon the chronicity." Dr. Frost went on to describe typical responses to this condition as well as various treatments, and testified that he had recommended a sphenopalatine ganglion block to interrupt the plaintiff's sympathetic dystrophy.

Dr. Frost then testified that, in his opinion, the plaintiff could not be involved in any type of activity with mobility, such as lifting or walking, because his condition required the use of crutches. This condition was present at the time of the initial examination and at the time of the rehearing. His prognosis for the plaintiff was guarded and dependent upon his response to the proposed treatment.

On cross-examination Dr. Frost testified that after trying the insert and crutches, he had asked Dr. Henkel to place the foot in a cast for 6 weeks to see if the plaintiff would respond, because "Sometimes these autonomic bouts will subside. And in his case it did not." The defendant's attorney asked Dr. Frost, "[I]s it the sympathetic dystrophy, is that what it is?" to which the doctor responded, "Yes, sir."

The medical evidence which has been summarized is sufficient to support a finding that the plaintiff's present disability is causally related to the accident of October 31, 1984. The findings of fact made by the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Hollinger v. Consolidated Motor Freight*, 223 Neb. 449, 390 N.W.2d 518 (1986); *Wilson v. City of North Platte*, 221 Neb. 90, 375 N.W.2d 134 (1985). Further,

> In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's

> Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be drawn therefrom.

Id. at 92, 375 N.W.2d at 137 (citing *Buck v. Iowa Beef Processors, Inc.*, 198 Neb. 125, 251 N.W.2d 875 (1977)).

The compensation court's finding of a causal connection was not clearly wrong. There was sufficient evidence from which the court could find the plaintiff's present disability was the result of the October 31, 1984, accident.

While Dr. Frost's testimony was not as specific as it could have been, it was sufficient for the compensation court to find the sympathetic dystrophy was a result of the accident. Viewing the evidence in the light most favorable to the plaintiff, as we are required to do, the evidence was sufficient to support the compensation court's finding of a causal connection between the plaintiff's present disability and the accident of October 31, 1984.

The defendant's second assignment of error concerns the award of vocational rehabilitation services.

The right of an injured workman to receive vocational rehabilitation benefits depends upon his inability to perform work for which he has previous training and experience. Neb. Rev. Stat. § 48-162.01 (Reissue 1984). See, also, *Smith v. Hastings Irr. Pipe Co.*, 222 Neb. 663, 386 N.W.2d 9 (1986); *Evans v. American Community Stores*, 222 Neb. 538, 385 N.W.2d 91 (1986). This is ordinarily a question of fact for the determination of the compensation court. *Pollock v. Monfort of Colorado*, 221 Neb. 859, 381 N.W.2d 154 (1986). However, when there is insufficient evidence to support an award, this court must modify, reverse, or set it aside. Neb. Rev. Stat. § 48-185(3) (Reissue 1984).

In this case the award of vocational rehabilitation services is premature. Dr. Frost, the sole medical witness presented by the plaintiff, testified that he was unable to determine, at that time, whether the plaintiff would be permanently disabled. Such a determination, he stated, was dependent upon the plaintiff's response to the prescribed treatment. It was his opinion that if

the plaintiff responded to the treatment "the likelihood of his being able to return to the job that he once had is good." This evidence will not support an award of vocational rehabilitation services. That part of the award must be reversed.

The award of vocational rehabilitation services is reversed, and the award is, in all other respects, affirmed.

AFFIRMED IN PART, AND
IN PART REVERSED.

DONALD R. WARD, APPELLANT, V. CITY OF MITCHELL, NEBRASKA, APPELLEE.

400 N.W.2d 862

Filed February 13, 1987. No. 86-160.

1. **Workers' Compensation: Appeal and Error.** Factual determinations of the Workers' Compensation Court will not be set aside on appeal unless they are clearly wrong.
2. _____: _____. We must consider the evidence in the light most favorable to the successful party, when testing the sufficiency of the evidence supporting the Workers' Compensation Court's findings of fact.
3. **Workers' Compensation: Expert Witnesses: Appeal and Error.** When the record presents nothing more than conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workers' Compensation Court.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Robert W. Mullin of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellant.

James R. Hancock of Hancock & Denton, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

Donald R. Ward appeals from an order of the Workers' Compensation Court denying him benefits. The only error assigned is that the compensation court erred in finding Ward

had not proved by a preponderance of the evidence that his symptoms were caused by his work-related exposure to polychlorinated biphenyl, also known as PCB. We affirm.

Factual determinations of the Workers' Compensation Court will not be set aside on appeal unless they are clearly wrong. *Beavers v. IBP, Inc.*, 222 Neb. 647, 385 N.W.2d 896 (1986); *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986); *Vredeveld v. Gelco Express*, 222 Neb. 363, 383 N.W.2d 780 (1986). We must consider the evidence in the light most favorable to the successful party, when testing the sufficiency of the evidence supporting the Workers' Compensation Court's findings of fact. *Beavers v. IBP, Inc., supra; Vredeveld v. Gelco Express, supra.* A review of the record shows a sufficient basis in evidence for the compensation court's findings regarding causality.

PCB is a toxic chemical, regulated by the EPA, that used to be added to oil as a fire retardant. The appellant claims that his exposure to PCB while dismantling, transporting, and reassembling a power substation while he was superintendent of utilities for the City of Mitchell caused his illnesses and seven hospitalizations, and now renders him unable to work.

In July of 1981 Ward worked on the substation in Alliance, Nebraska, and came in contact with the regulator. The oil inside the regulator had 1,385 parts per million PCB. Ward's contact with the regulator was brushing away greasy dirt on the outside of the bushings with a gloved hand. A glove, when tested later, showed 2.8 parts per million and 6.8 parts per million of two different isomers of PCB. Later in July, Ward became ill, and attributed it at the time to being bitten by a poisonous spider, although at the rehearing he testified for the first time that he felt this hospitalization was PCB-related.

In early September 1981 Ward returned to Alliance and, with the help of two other people, changed the voltage of the transformer by removing inspection plates and moving bars in the oil to different positions. He and his coworkers were required to put their hands into the oil to move the bars. The transformer oil had 229 parts per million PCB (one-sixth the concentration of PCB measured in the regulator). Neither coworker became ill, although each one's exposure was the

same as Ward's. One coworker testified Ward had his hands in oil for between 15 and 30 minutes, but not more than 30 minutes; Ward testified that he had his hands in the oil for up to 4 hours.

Ward was hospitalized in January 1982 for 3 days and in March 1982 for 5 days for hypertension, hepatitis, gall bladder problems, and liver problems. He was hospitalized in June 1982 due to having inhaled a toxic herbicide, and had three more hospitalizations between then and December 1983. He could only work half days, and in December 1983 he quit his job.

Considering the evidence of Ward's PCB exposure in the light most favorable to the appellee, it is clear that the medical evidence offered by the city supports a finding that Ward's symptoms were not PCB-related. Dr. Teitelbaum, a toxicologist and a witness for the City of Mitchell, testified by deposition that in his opinion Ward's exposure to PCB in the transformer for anywhere from 15 minutes to 2 hours would not have caused his illness. He also testified that the exposure with gloved hands with the regulator bushings would not be sufficient contact to cause PCB poisoning. Dr. Teitelbaum considered Ward's exposure to be short term and of little consequence, noting that only persons subjected to prolonged and significant exposure contracted severe illness. Dr. Teitelbaum also considered the level of PCB in Ward's body fat as being about median for his age and not indicative of any significant exposure, other than the exposure which is the fate of anyone who lives in the central United States. The absence of chloracne and peripheral neuropathy indicated to him that the illnesses are not PCB-related.

Dr. Teitelbaum was of the opinion that Ward's first symptoms were the result of a spider bite and his liver problems were due to the progression of hepatitis originally contracted in 1961 and compounded by toxic insult to the liver that is attributable to the many prescription drugs Ward took for ongoing hypertension, gall bladder problems, and gout; his alcohol intake; and the inhalation of herbicides, rather than to incidental PCB exposure.

The medical witnesses for Ward were of the opinion that PCB caused the symptoms, or at least aggravated the

preexisting hepatitis. A review of Dr. Teitelbaum's deposition shows a sufficient basis in evidence for the Workers' Compensation Court's findings regarding causation. We cannot say the findings are clearly wrong. When the record presents nothing more than conflicting medical testimony, we will not substitute our judgment for that of the compensation court. *Beavers v. IBP, Inc.*, 222 Neb. 647, 385 N.W.2d 896 (1986); *Vredeveld v. Gelco Express*, 222 Neb. 363, 383 N.W.2d 780 (1986). The findings of the compensation court as to causation must stand, and the judgment is affirmed.

AFFIRMED.

SANDRA F. EHRENBERG, APPELLEE, V. DONALD LEE EHRENBERG, APPELLANT.

400 N.W.2d 865

Filed February 13, 1987. No. 86-432.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Charles W. Balsiger of Jewell, Gatz, Collins & Dreier, for appellant.

Virginia Koerselman of Mitchell & Demerath, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Donald Lee Ehrenberg appeals from a decree entered by the separate juvenile court of Douglas County, Nebraska. By his action, Ehrenberg sought the custody of the minor children born of the marriage between the appellant and the appellee, Sandra F. Ehrenberg. The custody had earlier been awarded to Ms. Ehrenberg when the marriage of the parties was dissolved. Mr. Ehrenberg further sought to have the separate juvenile court hold appellee in contempt of court for removing the

children of the parties from Nebraska to Arizona without the permission of the separate juvenile court. The separate juvenile court denied all relief to Mr. Ehrenberg. Specifically, Mr. Ehrenberg maintains that the separate juvenile court erred in failing to hold Ms. Ehrenberg in contempt of court and in granting her motion, permitting her to remove the minor children of the parties from the State of Nebraska to the State of Arizona. We have reviewed the record de novo, as we are required to do in cases of this nature, and find that no error was committed by the separate juvenile court in regard to any of the actions or orders taken by it. For that reason the decree of the separate juvenile court of Douglas County, Nebraska, is, in all respects, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH TWEEDY, JR., APPELLANT.

400 N.W.2d 865

Filed February 13, 1987. No. 86-509.

1. **Criminal Law: Prosecuting Attorneys: Evidence: Pretrial Procedure.** If a prosecutor has a duty to disclose a statement in response to a general discovery request, it must derive from the obviously exculpatory character of the evidence.
2. **Criminal Law: Evidence.** In order for an omitted statement to be considered material, it must create a reasonable doubt as to the defendant's guilt that did not otherwise exist. That the evidence "might" influence the outcome is insufficient.
3. _____: _____. Where omitted evidence would have been cumulative and repetitive, the defendant suffered no prejudice because of the omission.
4. **Criminal Law: Convictions: Appeal and Error.** A conviction must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
5. **Criminal Law: Evidence: Intent.** When the sufficiency of the evidence as to criminal intent is questioned, the law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
6. **Sentences: Probation and Parole: Appeal and Error.** Whether to grant probation instead of a jail sentence is a matter left to the trial court's discretion.

Absent an abuse of discretion, a sentence imposed within the statutory limits will be upheld on appeal.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Leo J. Eskey, for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

The defendant-appellant, Kenneth Tweedy, Jr., was convicted at a bench trial in the district court for Dodge County of one count of first degree assault and one count of using a firearm in the commission of a felony. He was sentenced to 2 to 4 years on each count, to run consecutively, for a total sentence of 4 to 8 years, with credit for 26 days served.

Tweedy urges this court to reverse on two grounds: first, that the defendant was denied a fair trial because the State failed to disclose exculpatory evidence; and, second, that the evidence was insufficient to support the judgment. The appellant also submits that the district court abused its discretion by failing to place him on probation. Having reviewed the record before us and finding no error, we affirm the judgment and sentence of the district court.

Around midnight on the morning of October 20, 1985, Jon Patocka drove his wife, Denise, and the defendant into Fremont, Nebraska, to borrow a spotlight to use while hunting raccoons. The two men had been drinking beer since the afternoon. While in Fremont they stopped to eat at a Burger King restaurant before driving past a Taco John's restaurant. Tweedy thought he recognized someone in the Taco John's parking lot, so the driver circled the block. Tweedy yelled at a group of people on three-wheeled, all-terrain cycles and then realized that he did not recognize anyone in the group of seven people on six cycles.

Brian Wiese was driving the cycle on which David Havranek, the victim, was a passenger. Wiese testified that, after the verbal

exchange, the cycle riders were "motioned" to follow the car. One cycle was on each side of the car, and the car driver and the cycle rider on the left spit food at one another. The car eventually forced the cycle on its left from the road. The cycle on the right, driven by Scott Brown, then passed the car. The Wiese-Havranek cycle was second in line behind Patocka's Monza when the car and cycles began their 60- to 70-mph journey through the streets of Fremont.

When Wiese and Havranek were approximately two blocks behind the car, Wiese heard shots and observed the defendant's head and shoulders out of the window of the car on the passenger side; he was holding the barrel of a rifle outside the window. Wiese was half a block behind the defendant when he observed Tweedy sitting on the car door, head and shoulders above the roof, holding the rifle in normal aiming position.

The lead cycle then pulled into a police station parking lot. The car kept going. The cycle in front of Wiese and Havranek did a 180° turn to head toward the police station. Wiese followed the car to read the license number. Wiese also turned, and when the Wiese-Havranek cycle was proceeding in the opposite direction from the car, David Havranek was shot. Havranek dismounted from the cycle and entered the police station.

Wiese testified that, after the shot, he again observed the defendant sitting on the car door in normal aiming position, and subsequently saw Tweedy move into the car. The victim, David Havranek, also testified that Tweedy fired several shots into the air and eventually aimed at Wiese and him, with the butt of the gun positioned on his shoulder.

Detective Sergeant Tellatin of the Fremont Police Department testified that he identified the defendant, using the car's license number, and took him into custody that morning. He read the defendant his *Miranda* rights and secured two statements. Tweedy admitted firing the gun several times, denied sitting on the window bracing himself, and stated that the gun accidentally discharged as he was climbing back into the car. This remained Tweedy's position throughout the trial. None of the State's witnesses at trial actually observed Tweedy at the very moment Havranek was shot; however, he was

observed just before and after the shot.

Tweedy alleges that he was denied a fair trial due to the prosecutor's failure to disclose the existence of a statement made by Eugene Foster, a bystander. No specific request for the statement appears in the record, although a general request for "[t]he names and addresses of witnesses on whose evidence the charge [was] based" was made in a motion for discovery, which was eventually granted by the district court and does appear in the record. The defendant makes no argument that the charge is based on Foster's statement, and, in fact, Foster stated he would be unable to recognize the defendant.

If the prosecutor had a duty to disclose Eugene Foster's statement to the defendant in response to the general request described above, " 'it must derive from the obviously exculpatory character of [the] evidence in the hands of the prosecutor.' " *State v. Rice*, 214 Neb. 518, 527, 335 N.W.2d 269, 275 (1983) (quoting *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)). In order to be a material omission, the omitted proposed evidence must create a reasonable doubt as to the defendant's guilt that did not otherwise exist. That the evidence "might" influence the outcome is insufficient. *Rice, supra.*

The statement given by Eugene Foster was first reviewed by counsel for the defendant after the trial was had and the judgment rendered, but before sentencing. The statement was found in the presentence report, and its appearance in that document is the only reference regarding Eugene Foster's statement contained in the record before us.

In the transcript of Detective Chamberlain's interview of Eugene Foster in the presentence report, Foster stated he saw a man get out with a rifle, brace himself on the roof of the car, and shoot. Foster was 1 to 2 feet away from Havranek at the time of the shot, and when asked if the man was aiming at the victim, Foster stated, "He was aimin' that way." Foster said the defendant also could have been aiming at him or his friend Darryn Greser, who also stood a few feet away from the victim.

At trial Greser testified that, in his opinion, the defendant was aiming the gun and that the gun had also been pointing in his direction. In the appellant's brief Tweedy argues that "[i]t is

possible that Eugene Foster would have made a similar clarification concerning the word 'aiming' as did Darryn Greser." He makes an improbable argument that this "clarification" would have presented two witnesses from which the trier of fact could conclude the shot was unintentional and that Tweedy was only pointing the gun in a general direction and not truly aiming.

It is our opinion that Foster's statement is not obviously exculpatory. The State was under no duty to disclose it to the defendant. Foster's statement contradicts the defendant's testimony that he never sat on the car window and braced the rifle on his shoulder and contradicts the defendant's story that the gun went off accidentally as he was climbing into the car. Whether considered pointing or aiming, the statement tends to prove, rather than disprove, intent by showing the defendant had control of the gun at the time of the shot. It is important to note that the trial court heard Greser's supposed "clarification" of aiming and still found the shooting intentional. Since the defendant's best hope is that Foster might possibly have testified as Greser did (although Greser and Foster stated the defendant aimed), the evidence would have been repetitive and cumulative. We conclude that the defendant was not prejudiced by the State's nondisclosure of Eugene Foster's statement. He received a fair trial. There is no error in this regard.

Tweedy next challenges the sufficiency of the evidence used to sustain the judgment. Specifically, he contends that there is no evidence regarding the defendant's intent at the moment his rifle discharged the shot injuring Havranek other than his own testimony that the shot was fired accidentally. In *State v. Palmer, ante* p. 282, 289, 399 N.W.2d 706, 714 (1986), we noted that

> in determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

When the sufficiency of the evidence as to criminal intent is questioned, "the law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident." *State v. Thielen*, 216 Neb. 119, 125, 342 N.W.2d 186, 191 (1983).

Three witnesses testified that, just prior to the shot, the defendant was aiming the gun in the direction of the victim. According to Wiese, Tweedy was still in this same position seconds after the shot. Taking the view most favorable to the State, we conclude that the trier of fact was presented with sufficient evidence of the defendant's acts and of the circumstances surrounding the shooting to infer that the defendant acted intentionally.

The defendant's last assignment of error is that the district court abused its discretion by failing to place the defendant on probation. Whether to grant probation instead of a jail sentence is a matter left to the trial court's discretion. *State v. Kane, ante* p. 245, 397 N.W.2d 628 (1986). Absent an abuse of discretion, a sentence imposed within the statutory limits for the offense will be upheld on appeal. *State v. Gonzales, ante* p. 659, 399 N.W.2d 832 (1987).

Tweedy received two consecutive sentences of 2 to 4 years' imprisonment. The maximum penalty for each offense is 20 years in prison, a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1985). Although these are Tweedy's first felony convictions, we cannot help but note the seriousness of the offenses and the severity of the physical injury suffered by the victim. We note no abuse of discretion by the trial court. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHNNY E. WILSON, APPELLANT.

400 N.W.2d 869

Filed February 13, 1987. No. 86-522.

1. **Constitutional Law: Attorney and Client: Conflict of Interest: Effectiveness of Counsel.** Multiple representation does not give rise to a denial of the defendant's sixth amendment right to effective assistance of counsel unless an actual conflict of interest exists and that conflict affects the performance of counsel.
2. **Rules of the Supreme Court: Postconviction: Appeal and Error.** Any matter which can be determined from the record on direct appeal is considered by the Supreme Court when granting relief pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986), and is not available for further relief pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985).

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Anthony S. Troia of Troia Law Offices, P.C., for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal from the Douglas County District Court's denial of the appellant's motion for postconviction relief. The appellant, Johnny E. Wilson, was convicted of theft by unlawful taking under Neb. Rev. Stat. § 28-511 (Reissue 1985) and was sentenced to 5 to 10 years in the Nebraska Penal and Correctional Complex. The facts relevant to this appeal are as follows.

During the proceedings in the district court which gave rise to this appeal, the appellant and a codefendant were represented jointly by one assistant public defender. On January 3, 1983, the day before the jury was to be impaneled, counsel moved to withdraw from her representation of Wilson on the basis of conflict of interest. Upon further inquiry by the district court judge, counsel stated that she had arranged to have the codefendant transferred to juvenile court in return for a plea of guilty to the charge pending against him. Counsel stated that

she felt that she could not adequately represent the appellant due to the fact that she intended to call the codefendant at trial to testify for the appellant and felt that she could not both ask the codefendant to testify and advise him against giving statements which would be incriminating in later proceedings. The trial judge assured counsel that the codefendant would be adequately advised of his rights against self-incrimination. The district court judge also stated that he saw no possible conflict of interest, as the codefendant's case had been transferred to juvenile court and the public defender's office could easily appoint separate counsel for the codefendant. Counsel's motion to withdraw was denied.

On June 3, 1985, the appellant filed a petition for postconviction relief in the district court, alleging that the trial court denied him his sixth amendment right to effective assistance of counsel by declining to permit his trial counsel to withdraw on the ground of conflict of interest. In his order denying Wilson's motion for postconviction relief, Judge Hickman stated that the proper method by which Wilson could have challenged the trial judge's holding on a motion to withdraw was by direct appeal, and not through the use of a motion for postconviction relief. Judge Hickman also held that the issue of the propriety of his holding with regard to counsel's motion to withdraw had already been addressed on direct appeal through appellate defense counsel's motion to withdraw and was found not to be prejudicial to the appellant. Wilson's motion for postconviction relief was denied. This appeal follows.

Appellant first assigns as error that the trial court denied him his sixth amendment right to effective assistance of counsel by its failure to permit his trial counsel to withdraw on the ground of conflict of interest. Wilson argues that although the public defender revealed that she felt a conflict of interest existed as a result of her joint representation of both defendants, the trial court failed to conduct an inquiry into trial counsel's claim. We do not agree with the appellant's characterization of the facts. The trial court conducted an adequate inquiry as to the claim of conflict of interest, as the following exchange illustrates:

MRS. FERER: . . . [B]ecause of my dealings with both

John and Ty I don't feel that I can represent John as fairly as I could since I have had to take the side of the co-defendant - - -

THE COURT: In what respect?

MRS. FERER: Well, in asking the Court to transfer Ty to juvenile court I presumed that John was the instigator of this scheme and approached the Court in that way. I am now, of course, taking the complete opposite stand because Ty has now come to me and told me that he was the instigator of this crime and that John didn't know that the truck was being stolen.

THE COURT: Well, if there is a conflict within your office that can easily be rectified by your office withdrawing from Ty Penn's case and asking the juvenile court to appoint independent counsel for him.

MRS. FERER: Well, Your Honor, I think further that - -

THE COURT: But since this court has no further jurisdiction over Ty Penn, the case having been transferred because of his age, I don't see that there's a conflict with you representing Mr. Wilson.

MRS. FERER: I lost my train of thought. I still feel that I have some present responsibility towards Ty. I'm intending to call him as a witness in John's trial; but of course, anything he says could be used against him in a later prosecution and I feel that somebody should be advising him of that.

THE COURT: Well, certainly if you don't, the Court will.

MRS. FERER: But Your Honor, I can't — it's to Mr. Wilson's advantage to have Ty to testify. I don't feel that I am in a position to start advising Ty not to testify.

The U.S. Supreme Court has explored the issue of conflict of interest in a line of cases which includes *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). Under *Cuyler*, multiple representation does not give rise to a denial of the defendant's sixth amendment right to effective assistance of counsel unless an actual conflict of interest exists and that conflict affects the performance of counsel. Although we do

not encourage joint representation, we agree with the district court that any alleged conflict of interest as a result of the assistant public defender's joint representation of the appellant and his codefendant did not affect the performance of counsel. The codefendant's case was transferred to juvenile court, and the codefendant was called at trial to give exculpatory testimony for Wilson. The assistant public defender's representation of Wilson was not rendered ineffective by her representation of the codefendant. See *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984). We find that the appellant is unable to show that he was prejudiced by the assistant public defender's joint representation of him and his codefendant. *State v. Williams, ante* p. 114, 396 N.W.2d 114 (1986); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We are unable to discover a conflict of interest from our examination of the record. *State v. Kerns*, 203 Neb. 278, 278 N.W.2d 348 (1979). We find this assignment of error to be without merit.

Appellant's second and final assignment of error involves the district court's dismissal of his motion for postconviction relief. Appellant argues that Neb. Rev. Stat. § 29-3001 (Reissue 1985) permits a defendant to file a motion for postconviction relief to litigate the issue of whether the defendant's sixth amendment right to effective assistance of counsel has been denied. We find this assignment of error also to be without merit.

The district court dismissed the appellant's motion for postconviction relief. It stated that a challenge to one of the rulings was more properly addressed to this court on direct appeal, as it in fact had been in the appellate defense counsel's motion to withdraw pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986). Although the decision on the motion is itself unpublished, the motion to withdraw was granted and the judgment of the district court was affirmed. *State v. Wilson*, 216 Neb. xix (case No. 83-158, Dec. 14, 1983). In *State v. Sanders*, 220 Neb. 308, 369 N.W.2d 641 (1985), this court wrote:

> In granting relief pursuant to rule 3B, this court examines the entire record, not only to resolve those matters which are specifically called to the court's attention by

> court-appointed counsel but also to determine whether any possible errors exist. Therefore, any matter which can be determined from the record on direct appeal is considered by the Supreme Court when granting relief pursuant to rule 3B and is not available for further relief pursuant to the Nebraska Post Conviction Act. See, *State v. Weiland*, 190 Neb. 111, 206 N.W.2d 336 (1973); *State v. Losieau*, 182 Neb. 367, 154 N.W.2d 762 (1967).

Id. at 309, 369 N.W.2d at 642; *State v. Galvan*, 222 Neb. 104, 382 N.W.2d 337 (1986).

As the issue of propriety of the district court's failure to permit trial counsel to withdraw from representation of Wilson due to conflict of interest had previously been addressed by this court, the district court properly dismissed the appellant's motion for postconviction relief and its attempt to relitigate an issue which had already been addressed on direct appeal. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LYLE D. BURLING, APPELLANT.
400 N.W.2d 872

Filed February 13, 1987. No. 86-549.

1. **Drunk Driving: Proof.** An alcohol-related violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984) may be proved by establishing that one was in actual physical control of a motor vehicle while under the influence of alcohol or that one was in actual physical control of a motor vehicle while having ten-hundredths of 1 percent by weight of alcohol in his or her body fluid.
2. **Drunk Driving: Words and Phrases.** As used in Neb. Rev. Stat. § 39-669.07 (Reissue 1984), the phrase "under the influence of alcoholic liquor" means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner.
3. **Evidence: Words and Phrases.** "Competent evidence" is that which tends to establish the fact in issue; that which is admissible and relevant on the point in issue.
4. **Constitutional Law.** The Constitution of this state distributes the powers of government to three separate and coequal departments or branches, namely, the legislative, executive, and judicial branches, and prohibits any one branch from

exercising any power belonging to another branch.

5. **Constitutional Law: Evidence.** Determining whether evidence, if believed, is sufficient to sustain a conviction is a judicial function.
6. **Constitutional Law: Legislature: Evidence.** The Legislature may not declare the weight to be given to evidence or what evidence shall be conclusive proof of an issue of fact.
7. _____: _____: _____. Whether evidence is of probative value is a legal question, the judicial analysis and resolution of which the Legislature cannot impair.
8. **Blood, Breath, and Urine Tests.** A chemical test result of one's body fluid for alcohol content which is subject to a margin of error must be adjusted so as to give the defendant the benefit of that margin.
9. **Convictions: Appeal and Error.** A conviction will not be set aside in the absence of a showing that an error prejudiced the defendant.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed.

Robert R. Gibson of Professional Legal Associates of Nebraska, P.C., for appellant.

Robert M. Spire, Attorney General, and Janie C. Castaneda, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Following a county court bench trial, defendant, Lyle D. Burling, was convicted of failing to stop at a clearly marked stop sign and of driving while under the influence of alcohol, first offense, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984). The county court judgment was affirmed on appeal to the district court. While defendant appeals both convictions to this court, his three assignments of error relate solely to the drunk driving conviction and combine to claim that the district court erred in failing to find error appearing on the record made in the county court, in that (1) the Intoxilyzer Model 4011AS test result should not have been considered, and (2) the evidence does not support the conviction. We affirm.

At approximately 1 a.m. on July 13, 1985, Trooper Steven Gill of the Nebraska State Patrol observed a pickup truck, pulling a trailer which was carrying an automobile, weave across the centerline of the road four to five times, change speed

from 45 to 60 mph, and fail to stop for a stop sign at the intersection of two highways. Gill then turned on his flashing lights and proceeded to stop the defendant driver, who explained he had not stopped for the sign because of difficulty in pulling the trailer.

Gill noticed defendant had the odor of alcohol on his breath, had slurred speech, and had trouble retrieving his license from his billfold. When instructed to go to the patrol car, defendant staggered and swayed, lost his footing "once or twice," and had difficulty walking on the shoulder of the road.

After he got inside the patrol car, defendant was cited for failing to stop at the stop sign and was asked to recite the alphabet. He made three attempts to recite the alphabet, but could not proceed past the letter *k*. According to Gill, defendant also failed a "horizontal gaze test."

More field sobriety tests were performed outside of the patrol car. When instructed to walk heel to toe, defendant staggered and had to step to the side to balance himself. When instructed to hold his arms out, close his eyes, and touch his finger to the tip of his nose, defendant would either touch the bridge of his nose or miss his nose completely. He also swayed while attempting to perform this test. When instructed to balance on one leg and raise the opposite foot off the ground, defendant lifted his foot, then dropped it immediately. Defendant was asked to stand erect with his head tilted back and his eyes closed. During this maneuver defendant swayed, staggered, and almost fell. Finally, defendant was asked to take a preliminary breath test, which he also failed. Gill concluded that defendant was driving while under the influence of alcohol.

Defendant was then taken to the Jefferson County sheriff's office, where a test on an Intoxilyzer Model 4011AS was administered by Fairbury Police Officer Terry Mathy. Mathy testified that he had difficulty getting a sample because defendant would not blow hard enough into the machine to produce a reading. After the fifth attempt, a reading showing that defendant had a blood alcohol level of .164 of 1 percent by weight of alcohol was obtained. Mathy also testified that defendant's speech was slurred, his clothes were disorderly, and

his eyes were bloodshot.

Section 39-669.07 provides in part:

> It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or when that person has ten-hundredths of one per cent or more by weight of alcohol in his or her body fluid as shown by chemical analysis of his or her blood, breath, or urine. Any person who shall operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or while having ten-hundredths of one per cent by weight of alcohol in his or her body fluid as shown by chemical analysis of his or her blood, breath, or urine shall be deemed guilty of a crime . . . .

Thus, an alcohol-related violation of § 39-669.07 may be proved by establishing that one was in actual physical control of a motor vehicle while under the influence of alcohol or that one was in actual physical control of a motor vehicle while having ten-hundredths of 1 percent by weight of alcohol in his or her body fluid. *State v. Tomes*, 218 Neb. 148, 352 N.W.2d 608 (1984); *State v. Hilker*, 210 Neb. 810, 317 N.W.2d 82 (1982); *State v. Weidner*, 192 Neb. 161, 219 N.W.2d 742 (1974). As used in § 39-669.07, the phrase "under the influence of alcoholic liquor" means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner. *State v. Weidner, supra.* See, also, *Uldrich v. State*, 162 Neb. 746, 77 N.W.2d 305 (1956); *Shanahan v. State*, 162 Neb. 676, 77 N.W.2d 234 (1956).

Under the provisions of § 39-669.07 the measurement of the amount of alcohol in the body fluid, that is, in the blood, may be determined by a chemical analysis of the blood, breath, or urine. Thus, the result of any chemical analysis of the breath or urine must be converted into a percentage by weight of alcohol in the blood.

An associate professor of pharmacology who is also a research scientist testified on behalf of the defendant that the machine known as the Intoxilyzer Model 4011AS is an

abbreviated infrared spectrophotometer, or infrared camera, which reads the amount of infrared light waves absorbed by alcohol and certain other organic-compound molecules present in the test subject's breath. The machine then converts that reading into a measure of the alcohol in the subject's blood, which registers as the test result. The conversion formula built into the machine assumes that alcohol in any human's breath will be distributed and reflected in his or her blood in a ratio of 1 breath unit to 2,100 blood units. According to this witness, recent research has shown that the ratio in fact varies from one human to another and ranges from 1:1,100 to 1:3,400. For this reason forensic toxicologists have abandoned reliance upon the 1:2,100 ratio. Moreover, the ingestion of certain substances other than alcohol will adversely affect the Intoxilyzer test result. Thus, it is this pharmacologist's opinion that the Intoxilyzer does not reliably measure blood alcohol levels. The State adduced no evidence to contradict the foregoing testimony.

Neb. Rev. Stat. § 39-669.11 (Reissue 1984) provides that a chemical test of blood, breath, or urine made in conformity with methods approved by the Department of Health and by an individual possessing a valid permit issued by that department

> shall be competent evidence in any prosecution under a state statute or city or village ordinance involving operating a motor vehicle while under the influence of alcoholic liquor, or involving driving or being in actual physical control of a motor vehicle with an amount of alcohol in the blood in violation of a statute or a city or village ordinance.

"Competent evidence" is that which tends to establish the fact in issue; that which is admissible and relevant on the point in issue. See, *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. 372, 348 N.W.2d 879 (1984); *Shepherd v. City of Omaha*, 194 Neb. 813, 235 N.W.2d 873 (1975), *overruled on other grounds Caniglia v. City of Omaha*, 210 Neb. 404, 315 N.W.2d 241 (1982). Thus, by enacting § 39-669.11, the Legislature has made breath tests conducted in accordance with the regulations of the Department of Health admissible in evidence on the issue of the level of alcohol in one's blood.

The Constitution of this state, however, distributes the powers of government to three separate and coequal departments or branches, namely, the legislative, executive, and judicial branches. It further prohibits any one branch from exercising any power belonging to another branch. Neb. Const. art. II, § 1. It has been held that while the Legislature has the right to prescribe acceptable methods of testing for alcohol content in the body fluid, and perhaps even the right to prescribe that such evidence is admissible in a court of law, it is a judicial function to determine whether the evidence, if believed, is sufficient to sustain a conviction. *State v. Bjornsen*, 201 Neb. 709, 271 N.W.2d 839 (1978). Accord *State v. Boehmer*, 1 Haw. App. 44, 613 P.2d 916 (1980). Stated another way, the Legislature may not declare the weight to be given to evidence or what evidence shall be conclusive proof of an issue of fact, *People v. Buford*, 110 Ill. App. 3d 46, 441 N.E.2d 1235 (1982); that is to say, determining whether evidence is of probative value is a legal question, and the Legislature cannot impair judicial analysis and resolution of such questions. See *Kentucky Com'n, etc. v. Com., Dept. of Justice*, 586 S.W.2d 270 (Ky. App. 1979).

Even ignoring in this instance the effect of ingesting certain substances, the uncontroverted testimony of the pharmacologist compels the conclusion that if one's breath-to-blood distribution ratio were at the 1:3,400 level, the machine would understate his or her blood alcohol level, whereas if one's distribution ratio were at the 1:1,100 level, the machine would overstate his or her blood alcohol level. *State v. Bjornsen, supra*, ruled that a test result which was subject to a margin of error had to be adjusted so as to give the defendant the benefit of that margin. Thus, we are concerned only with the degree by which the machine may overstate defendant's blood alcohol level. One having a 1:1,100 breath-to-blood distribution ratio has an actual blood alcohol level which is but 52.38 percent of the reading produced by the machine. Therefore, in this case the Intoxilyzer result must be reduced to 52.38 percent of .164 of 1 percent, that is, to .086 of 1 percent. Consequently, the Intoxilyzer test result fails to establish that defendant had "ten-hundredths of 1 percent by weight of

alcohol in his blood" and therefore fails to establish a violation of § 39-669.07.

That conclusion does not, however, resolve the matter, for a conviction will not be set aside in the absence of a showing that an error prejudiced the defendant. *State v. Borchardt, ante* p. 47, 395 N.W.2d 551 (1986). Even discarding the Intoxilyzer test result, the preliminary breath test result, *State v. Klingelhoefer*, 222 Neb. 219, 382 N.W.2d 366 (1986), and the "horizontal gaze test" result, *State v. Borchardt, supra*, the remaining evidence that defendant had the odor of alcohol on his breath, slurred his speech, had bloodshot eyes, had trouble retrieving his license from his billfold, was disheveled, could not recite the alphabet, had difficulty in coordinating his movements, could not keep his balance, failed to stop at a stop sign, and crossed over the centerline of the road four or five times overwhelmingly supports the conclusion that he had ingested alcohol in an amount sufficient to impair to an appreciable degree his ability to operate a motor vehicle in a prudent and cautious manner, thus establishing a violation of § 39-669.07. Therefore, the error the county court committed in considering the Intoxilyzer test result was harmless beyond a reasonable doubt and provides no basis for reversing defendant's conviction.

The judgment of the district court being correct, it is affirmed.

AFFIRMED.

FATHER FLANAGAN'S BOYS' HOME, A NONPROFIT NEBRASKA CORPORATION, APPELLEE, V. DANNY GOERKE, APPELLANT.
401 N.W.2d 461

Filed February 20, 1987. No. 85-325.

1. **Records: Appeal and Error.** A brief may not expand the evidentiary record and must limit itself to arguments supported by the record.
2. **Fair Employment Practices: Discrimination: Proof.** In a discrimination suit brought under the provisions of Neb. Rev. Stat. § 48-1104 (Reissue 1984) of the Nebraska Fair Employment Practice Act, the following is the procedure to be followed in presentation of evidence relevant to a question about discrimination

against a disabled person: First, the complainant has the burden of proving a prima facie case of discrimination. Second, if the complainant succeeds in proving that prima facie case, the burden shifts to the respondent to articulate some legitimate, nondiscriminatory reason for the complainant's rejection or discharge from employment. Third, should the respondent carry the burden, the complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the respondent were not its true reasons, but were a pretext for discrimination.

3. **Fair Employment Practices: Words and Phrases.** Under Neb. Rev. Stat. § 48-1101 (Reissue 1984), "disability" designates a protected class regarding employment in Nebraska. By virtue of Neb. Rev. Stat. § 48-1102(8) (Reissue 1984), "epilepsy" is included within the definition of a "disability," but only if such epilepsy is "unrelated to such person's ability to engage in a particular occupation."

Appeal from the District Court for Douglas County: DARVID D. QUIST, Judge. Affirmed.

Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellant.

Joseph C. Byam of Byam & Byam, for appellee.

Steven E. Guenzel of Barlow, Johnson, DeMars & Flodman, and Cynthia Lehman, for amici curiae Epilepsy Foundation of America et al.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

When Father Flanagan's Boys' Home discovered that Danny Goerke was an epileptic, it dismissed him from employment as an assistant family teacher. Goerke filed a charge with the Nebraska Equal Opportunity Commission, alleging that the home discriminated against him, thereby violating the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 through 48-1126 (Reissue 1984). The commission determined that the home had unlawfully discriminated against Goerke and ordered that he be reinstated to his former employment and be paid back wages and benefits. On appeal by the home, the district court reversed the commission's decision. We affirm.

Our standard of review is controlled by the provisions of

Neb. Rev. Stat. § 84-918 (Reissue 1981), and we accordingly review the matter de novo on the record. *Harris v. Misty Lounge, Inc.*, 220 Neb. 678, 371 N.W.2d 688 (1985).

Before undertaking that review, however, we sustain the home's motion to strike those portions of the brief filed by the amici curiae, Epilepsy Foundation of America and Epilepsy Association of Nebraska, Inc., which constitute evidentiary material not received in evidence in this case. A brief may not expand the evidentiary record and must limit itself to arguments supported by the record brought to us. See, *Raymond v. Department of Motor Vehicles*, 219 Neb. 821, 366 N.W.2d 758 (1985); *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983); Neb. Ct. R. of Prac. 9C(2) (rev. 1986).

In 1966, when he was 7 years old, Goerke suffered a grand mal epileptic seizure, lost consciousness, and experienced convulsions. Therapy involving prescribed medications was commenced and continues to this day. During his youth, Goerke suffered a number of petit mal seizures wherein he experienced a preliminary sense of an impending episode, which was followed approximately 1 1/2 minutes later by a loss of consciousness for approximately 15 seconds. However, Goerke has not experienced a seizure during the last 10 years. Goerke's physician, a neurologist, reported that the condition has been under control since 1973. Goerke rarely forgets his medication, but even on those rare occasions when he has overlooked his medication seizures have not occurred. On especially stressful days, Goerke increases his medication. Epilepsy does not interfere with Goerke's mental processes, concentration, or coordination.

The home provides care for and educates boys ranging from 10 to 19 years of age who are homeless, abandoned, neglected, delinquent, or otherwise disadvantaged, and utilizes school and on-campus homes, which are operated through specially trained, married family teaching couples. Family couples, with their own children, live on the home's campus and are responsible for providing a family environment for the 8 to 10 boys who have been assigned to them. They teach the boys, among other things, self-discipline and socially acceptable living skills, as well as encourage their moral and religious

development. An assistant teacher is assigned to assist each couple and to take over when the couple is away from the home. When and for how long an assistant is to take over is a matter negotiated and arranged between the assistant and the particular couple to whom the assistant has been assigned. The assistant does most of the driving required to take the boys to various appointments, activities, and places of employment. The boys themselves are not allowed to drive.

In 1983, Goerke applied for a job as an assistant family teacher at the home. In his written application for employment, Goerke stated that he had no physical handicaps which would impair his ability to perform the job. He so answered because he believed that his history of past seizures would not impair his ability to do the job. When asked about his physical health during one of the six or seven oral interviews the home conducted, Goerke said he was in good health except for a bad knee. The only job qualifications of which he was advised were the requirements that he have a valid driver's license and a high school diploma. Goerke was a high school graduate and possessed a Minnesota driver's license, which he has continually held since the age of 16. Goerke has been involved in two motor vehicle accidents in his lifetime. One accident was a minor collision attributable to icy roads, and the other was a single-car accident when he was a high school student. Neither incident involved any aspect of epilepsy as a factor in the accident.

Goerke had previously worked for 6 months at a juvenile correctional facility for 12- to 18-year-old boys, operated by the State of Minnesota. The facility was located in a relatively isolated area approximately 50 miles from the nearest town. Goerke's duties included assigning the juveniles work duties, monitoring their behavior, and taking care of medical emergencies as a trained emergency medical technician. His duties also required a considerable amount of driving, including transporting juveniles by vehicle into town for medical appointments and other purposes, and obtaining equipment and supplies for the facility. Goerke had no difficulty making such trips.

Goerke was hired by the home and began his job training with a couple to whom he was assigned at the home. According

to the schedule negotiated with this couple, Goerke was to work every other weekend, during which time the couple would be away from the home, and, in addition, was to work from 2:30 to 10:30 p.m. 5 days per week. During these periods, Goerke was to assist the operation of a motivational system, oversee the boys' activities, prepare meals as needed, develop relationships with the boys, and assist them. Additionally, he was to drive the boys as circumstances required and to accompany the couple and the household members on trips to Lake Okoboji. Goerke expected to live away from the home and drive to work.

The amount of work-related driving required of an assistant varies from one couple to another. Although there is no evidence as to what percentage of his time Goerke would spend driving, there is evidence that some assistants devote as much as half their employment time to duties in which driving is required.

Goerke was discharged from his employment at the home near the end of his training period and before he had driven any of the boys anywhere. The discharge came about after he asked the couple to whom he had been assigned where he might store his medication. At this point the fact that Goerke suffered from epilepsy was revealed. The home then informed him it had a policy prohibiting epileptics from serving as assistant family teachers. It should perhaps be noted at this point that the parties raise no issue as to whether Goerke was required by law to have a Nebraska driver's license. See Neb. Rev. Stat. §§ 60-403 and 60-410 (Reissue 1984). The home offered Goerke employment in its maintenance or custodial departments, but nothing was available with duties whereby he could work directly with the boys, as Goerke desired.

Although the home had no written policy on epilepsy as such, it determined in 1980 that, as a result of epileptic seizures sustained by some of its employees, staff members with histories of epileptic seizures should not be allowed to transport the boys. The only memoranda concerning this policy were the individual communications to the various epileptics informing them of such decision. The written job description for assistants did not mention epilepsy as a disqualifying condition. The home's policy was described as a "blanket exclusion for all

individuals who had a known history of seizures," but the home had not screened employees to determine who was suffering from epilepsy. At the hearing, the home did not present any evidence that epileptics in general, and Goerke in particular, were unable to perform the duties of an assistant family teacher.

Section 48-1104 of the Nebraska Fair Employment Practice Act provides in relevant part that it "shall be an unlawful employment practice for an employer: (1) To . . . discharge any individual . . . because of such individual's . . . disability . . . ."

Section 48-1102(8) defines disability as including epilepsy or seizure disorders "unrelated to such person's ability to engage in a particular occupation."

Additionally, § 48-1111(1) provides that it shall not be an unlawful employment practice for an employer to deny privileges of employment "when the nature and extent of a disability reasonably preclude the performance of the particular employment."

In a discrimination suit brought under the provisions of § 48-1104 of the Nebraska Fair Employment Practice Act, the following is the procedure to be followed in presentation of evidence relevant to a question about discrimination against a disabled person: First, the complainant has the burden of proving a prima facie case of discrimination. Second, if the complainant succeeds in proving that prima facie case, the burden shifts to the respondent to articulate some legitimate, nondiscriminatory reason for the employee's rejection or discharge from employment. Third, should the respondent carry the burden, the complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the respondent were not its true reasons, but were a pretext for discrimination. See *Harris v. Misty Lounge, Inc.*, 220 Neb. 678, 371 N.W.2d 688 (1985). See, also, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984).

The first question to be decided, then, is whether Goerke has proved a prima facie case of discrimination against a person with a disability within the Nebraska Fair Employment Practice

Act. Goerke may prove his prima facie case by showing:

> (1) that he is a member of a protected class within the meaning of the Nebraska Fair Employment Practice Act, §§ 48-1101 et seq.; (2) that he is qualified for the position of employment sought; (3) that he applied for and was rejected [or discharged from] that position; and (4) that after he was rejected [or discharged] the job remained open.

Williams v. Goodyear Tire & Rubber Co., 219 Neb. 748, 751, 366 N.W.2d 132, 135 (1985). See, also, *McDonnell Douglas Corp. v. Green, supra* at 802, n.13 ("The facts necessarily will vary in [discrimination] cases, and . . . the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations").

Under § 48-1101, "disability" designates a protected class regarding employment in Nebraska. By virtue of § 48-1102(8), "epilepsy" is included within the definition of a "disability," but only if such epilepsy is "unrelated to such person's ability to engage in a particular occupation."

The record conclusively establishes that Goerke is an epileptic. In order to be within a protected class, however, Goerke must establish that his condition was unrelated to his ability to perform employment duties and did not adversely affect his carrying out the responsibilities of an assistant teacher.

Goerke's evidence is that his condition has been under control by medication for at least 10 years and that he had, at least for a short time, successfully performed for another employer some of the duties required by the home. The evidence also establishes, however, that the dosage Goerke requires depends upon the amount of stress he encounters and that he does, quite humanly, occasionally forget to take his medicine. The Nebraska Fair Employment Practice Act does not require the home to risk the safety of the boys for whom it is responsible on the assumption that Goerke has not forgotten to take his medication and that he has accurately forecast the amount of stress he will encounter and has properly adjusted his dosage.

It is self-evident that transporting boys produces varying

degrees of stress, depending upon the presence of a number of variables, such as weather, road, traffic, and mechanical conditions, and the behavior of one's passengers. The fact Goerke has not yet had a seizure while transporting others does not require the home to risk the safety of the boys in its charge on the basis of trial and error, and thereby invite and await disastrous results.

We note that the U.S. Department of Transportation regulation found at 49 C.F.R. § 391.41(b)(8) (1985) disqualifies epileptics from operating motor carriers in interstate commerce. While we recognize that the Department of Transportation regulation does not apply to the home, the regulation's existence nonetheless demonstrates that the department considers epileptics unsuited to be commercial motor vehicle operators. See *Costner v. United States*, 720 F.2d 539 (8th Cir. 1983). While there are undeniable differences between commercial interstate driving and the driving duties of an assistant family teacher for the home, the safety concerns are nonetheless similar.

Thus, we conclude that Goerke's epilepsy is not unrelated to his ability to engage in the home's occupation of assistant family teacher and that the nature of epilepsy is such as to reasonably preclude performance of that employment. That being so, Goerke has failed to prove that he is within a protected class and thus has failed to prove a prima facie case of discrimination.

The judgment of the district court being correct, it is affirmed.

AFFIRMED.

SHANAHAN, J., dissenting.

If facts and law are disregarded, today's decision may become acceptable.

Before receipt of his driver's license at age 16, Goerke held a farm permit issued by the State of Minnesota and operated farm machinery, tractors, trucks, cars, and pickups used in agricultural operations. Later, when employed at Thistledew, a Minnesota correctional facility with 53 boys and a capacity of 70, Goerke frequently drove a van or station wagon to transport boys, ages 12 to 18, from Thistledew to neighboring

towns, sometimes involving trips in excess of 100 miles. As noted by the majority, Goerke's duties at Thistledew "required a considerable amount of driving." In April 1983 Goerke came to Boys Town because he saw an opportunity to advance his career and to take additional courses at a local university. Three weeks after Goerke started his job, and without any intervening incident detrimental to the home, Boys Town discharged him from employment when the home learned about Goerke's epilepsy. As additional background, reflected in the majority's opinion, Goerke has not experienced an epileptic episode during the last 10 years, even when he may have overlooked taking medication, and epilepsy "does not interfere with Goerke's mental processes, concentration, or coordination."

The Legislature has clearly expressed the public policy which is the foundation of the Nebraska Fair Employment Practice Act:

> It is the policy of this state to foster the employment of all employable persons in the state on the basis of merit regardless of their race, color, religion, sex, disability, or national origin, and to safeguard their right to obtain and hold employment without discrimination because of their race, color, religion, sex, disability, or national origin. Denying equal opportunity for employment because of race, color, religion, sex, disability, or national origin is contrary to the principles of freedom and is a burden on the objectives of the public policy of this state. . . .

Neb. Rev. Stat. § 48-1101 (Reissue 1984).

Through the Nebraska Fair Employment Practice Act, the Legislature has sought to secure to the disabled full and equal access to employment, based on merit and bounded only by the actual disability which an employee or potential employee may be unable to overcome. Employment discrimination, attributable to a classification based solely on an individual's disability rather than ability, is "peculiarly repugnant in a society that prides itself on judging each individual by his or her merits." *Andersen v. Exxon Co.*, 89 N.J. 483, 491, 446 A.2d 486, 490 (1982). A disability, by itself, is not a permissible basis to assume that an individual is unable to function in a particular context. *Southeastern Community College v. Davis*, 442 U.S.

397, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (1979).

However, Neb. Rev. Stat. §§ 48-1102(8) and 48-1111(1) (Reissue 1984) of the Nebraska Fair Employment Practice Act secure to the employer freedom to reject an applicant for employment or discharge an employee when such individual is unable to perform the duties imposed by the particular employment because that individual is generally unqualified for the employment or has a disability which actually impedes or prevents adequate job performance. See *Andersen v. Exxon Co., supra.*

Concerning the Nebraska Fair Employment Practice Act and unlawful discrimination based on disability, the question is whether the nature and extent of an individual's disability reasonably preclude adequate performance of the particular job. See, *Andersen v. Exxon Co., supra; Foods, Inc. v. Iowa Civil Rights Commission*, 318 N.W.2d 162 (Iowa 1982); *Silverstein v. Sisters of Charity*, 43 Colo. App. 446, 614 P.2d 891 (1979).

In view of Goerke's work and medical history, buttressed by the evidence from the neurologist who was Goerke's attending physician, Goerke, although an epileptic, was able to perform the exact job from which he was discharged. Goerke has proved he is a member of a protected class and has, therefore, established a prima facie case of employment discrimination condemned by the Nebraska Fair Employment Practice Act.

Whatever has prompted the majority to refer to regulations of the U.S. Department of Transportation—regulations which the majority readily acknowledges are inapplicable to Boys Town—remains without suitable explanation and cogent correlation. The federal regulations pertain to drivers of 18-wheelers, semis, tremendous trucks, and other motorized mammoths moving for protracted periods as common carriers in interstate commerce. The "undeniable differences between commercial interstate driving" and Goerke's driving duties at Boys Town annihilate any possible relevance regarding those federal regulations which, in relation to this case, are reduced to bureaucratic bunkum.

The majority's opinion apocalyptically announces: "The fact that Goerke has not yet had a seizure while transporting others

does not require the home to risk the safety of the boys in its charge on the basis of trial and error, and thereby invite and await disastrous results." To the majority, it is absolutely inevitable that Goerke, an epileptic, will cause "disastrous results" in employment such as that at Boys Town. The facts do not warrant such awesome augury. Only a conclusion contradictory to the prognostication of the majority is deducible from facts presented to this court.

One objective of the antidiscrimination provision of the Nebraska Fair Employment Practice Act is prohibition of employment discrimination resulting from unfounded stereotyping of persons disabled by some physical or mental handicap. That objective is, as yet, unrealized. Today, epileptics; tomorrow, diabetics; thereafter . . . ?

KRIVOSHA, C.J., and WHITE, J., join in this dissent.

DAN K. WAYLETT, APPELLEE, V. UNITED SERVICES AUTOMOBILE ASSOCIATION, APPELLANT.

401 N.W.2d 160

Filed February 20, 1987. No. 85-341.

1. **Insurance: Contracts: Intent.** An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made.
2. **Insurance: Contracts.** An insurance policy is to be construed as any other contract; if its terms are clear, they are to be applied according to their plain and ordinary meaning.
3. _____: _____. The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded with directions to dismiss.

James W. Knowles and Edward A. Mullery, for appellant.

Martin A. Cannon of Matthews & Cannon, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

This appeal involves the interpretation of an underinsured motorist coverage policy issued by the appellant, United Services Automobile Association (U.S.A.A.), to the appellee, Dan K. Waylett.

The record discloses that on August 5, 1981, an automobile, then being driven by Waylett and occupied by his wife, Maryann, and their two daughters, Denise and Michele, was struck head on when an automobile driven by one Valerie Fitzpatrick came across the centerline of the highway. As a result of the accident all four occupants were injured. It was admitted that the automobile, owned by Paul and Julie Foxhoven and being driven by Fitzpatrick, was covered by a policy of automobile insurance with a limit of $100,000 per accident. It was further admitted that the carrier paid in settlement of the claims of the parties the policy limits, divided as follows: Maryann Waylett, $50,000; Michele Waylett, $25,000; Dan Waylett, $25,000. It was further admitted that the driver of the automobile, Valerie Fitzpatrick, also had a policy of insurance with a limit of $50,000 per accident and that the entire policy was paid by the carrier as follows: Maryann Waylett, $25,000; Denise Waylett, $25,000. It was further admitted that the county of Sarpy, Nebraska, had a policy of liability insurance and, in apparent settlement of claims made by the Wayletts, paid to them a total of $175,000 as follows: Maryann Waylett, $120,000; Denise Waylett, $35,000; Michele Waylett, $10,000; Dan Waylett, $10,000. The Wayletts therefore received a combined payment of $325,000 from all persons or organizations which might be responsible for the injuries they suffered as a result of the accident on August 5, 1981.

Waylett then sought to recover additional damages from U.S.A.A. under an underinsured motorist endorsement issued by U.S.A.A. Following the overruling of a motion for

summary judgment made by U.S.A.A., the court sustained Waylett's motion for a bifurcated trial, and a jury was impaneled to determine the amount of the damages incurred by the Wayletts. The district court, then sitting without a jury, held a separate hearing to determine what part, if any, of the damages was covered by the underinsured motorist coverage. The court rendered its judgment as follows: Maryann Waylett, $25,000; Denise Waylett, $75,000; Michele Waylett, $75,000; Dan Waylett, $75,000. It is from that judgment which U.S.A.A. now appeals. In support of its appeal it assigns 10 errors. Because of the manner, however, in which we dispose of this case, we need only consider assignment of error No. 5, which reads: "The District Court erred in failing to offset the amounts paid by the insurers of Valerie Fitzpatrick, Paul Foxhoven, Julie Foxhoven, and Sarpy County against the limit of liability per accident of the underinsured motorist coverage." We agree with U.S.A.A. that the district court erred, and, for that reason, we reverse and dismiss.

The underinsured motorist coverage is contained in an endorsement made a part of a policy purchased by Waylett from U.S.A.A. The policy provides in part: "We will pay damages which a **covered person** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of bodily injury: 1. Sustained by a **covered person;** and 2. Caused by an accident."

The policy then further provides: "We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements."

The schedule on the policy provides that the limits of liability on the policy are $100,000 for each person; $300,000 for each accident. The policy has a further provision, however, which affects the amount of coverage. The policy provides: "However, the limit of liability shall be *reduced* by *all sums* paid because of the bodily injury by or on behalf of *persons or organizations* who *may be* legally responsible." (Emphasis supplied.) U.S.A.A. contends that because the amounts paid by Fitzpatrick, the Foxhovens, and Sarpy County exceeded $300,000, to wit: $325,000, the limit of liability per each

accident was reduced to zero, and therefore there was no underinsured motorist coverage.

Waylett, on the other hand, maintains that U.S.A.A. is not entitled to consider the payments made by Sarpy County. In support of that position, Waylett cites to us the cases of *State Farm Mut. Auto. Ins. Co. v. Selders*, 187 Neb. 342, 190 N.W.2d 789 (1971), and *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968). In particular, Waylett cites to us from *State Farm Mut. Auto. Ins. Co. v. Selders, supra* at 347, 190 N.W.2d at 792, as follows:

> "A provision, drawn by the insurer to comply with the statutory requirement of *uninsured* motorist coverage, must be construed in light of the purpose and policy of the statute. Such a provision, drawn in pursuance of a statutorily declared public policy, is enacted for the benefit of injured persons traveling on the public highways. Its purpose is to give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy. Such provisions are to be liberally construed to accomplish such purpose." Statutory requirements must be complied with by insurers and if the policy issued fails in this respect, the statute will be read into the policy.

(Emphasis supplied.)

That citation has no application in the instant case for two reasons. In the first place, at the time that the underinsured motorist coverage was issued by U.S.A.A. to Waylett, there was no underinsured motorist statute, and therefore the agreement was simply the result of negotiations between the parties.

Furthermore, the Underinsured Motorist Insurance Coverage Act, enacted by the Nebraska Legislature on January 1, 1987, Neb. Rev. Stat. §§ 60-571 to 60-582 (Cum. Supp. 1986), contains provisions significantly different from the provisions of the uninsured motorist coverage involved in *Selders* and *Stephens* (see Neb. Rev. Stat. §§ 60-509.01 to 60-509.04 (Reissue 1984)). In particular, there is no provision in the *un*insured motorist statutes similar to the underinsured

motorist statute, § 60-578, reducing the liability by reason of amounts paid or received. Rather than attempting to decide this on the basis of some statutorily declared public policy, we are, instead, required to determine this on the basis of the plain meaning of the contract entered into between the parties.

We observed in *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 25, 317 N.W.2d 745, 748 (1982): " 'An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made. . . .' "

In *Lumbard v. Western Fire Ins. Co.*, 221 Neb. 804, 807, 381 N.W.2d 117, 119 (1986), we further said: "The rule controlling the resolution of the issues presented by that ground is that an insurance policy is to be construed as any other contract; if its terms are clear, they are to be applied according to their plain and ordinary meaning." We further observed in *Lumbard, supra* at 807, 381 N.W.2d at 119:

> It is true that if an insurance policy is ambiguous, it will be construed in favor of the insured. However, an ambiguity exists only when the policy can be interpreted to have two or more reasonable meanings. *Denis v. Woodmen Acc. & Life Co.*, 214 Neb. 495, 334 N.W.2d 463 (1983). An ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.

And, in the case of *Pettid v. Edwards*, 195 Neb. 713, 716, 240 N.W.2d 344, 346-47 (1976), we said:

> The parties to an insurance contract may contract for any lawful coverage and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute. Mills v. Aetna Ins. Co., 168 Neb. 612, 96 N.W.2d 721. An insurance policy should be considered as any other contract and be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning. Preferred Risk Mut. Ins. Co. v. Continental Ins. Co., 172 Neb. 179, 109 N.W.2d 126.
>
> The plain language of the policy in this case limited the

> liability of the intervener to the limit stated in the declarations as applicable to each person, regardless of the number of automobiles to which the policy applied. It is difficult to see how the intervener could have stated more clearly the limit for medical payments coverage would be $1,000 per person per accident although the policy might apply to more than one automobile. In view of the language used the plaintiff could have no reasonable expectation that the policy did not mean exactly what it said.

(Emphasis omitted.) See, also, *Johnsen v. Harper*, 213 Neb. 145, 328 N.W.2d 192 (1982).

Our examination of the provisions of the endorsement leads us to the conclusion that the language is clear and unambiguous and requires no interpretation.

With these rules in mind we then examine the policy in question. It provides in clear and precise terms that the $300,000 (the limit of liability) is to be reduced by *all sums* paid because of the bodily injury by or on behalf of *persons or organizations which may* be legally responsible. We can perceive of no way in which the sentence could be made any clearer. The word "all" is one of the most inclusive terms in the English language and does not exclude anyone or anything. As we said in *Kellogg Company v. Herrington*, 216 Neb. 138, 147, 343 N.W.2d 326, 332 (1984): "Few words in the English language are as clear in meaning as is 'all' . . . . 'The word "all" is commonly understood and usually does not admit of an exception, addition or exclusion.' " Therefore, all of the moneys are to be used in reducing the limits of liability if they were paid because of the bodily injury by or on behalf of persons or organizations which may be legally responsible. All of the moneys paid, including that paid by Sarpy County, were paid because of injuries sustained in an accident on August 5.

And, finally, we must simply acknowledge that Sarpy County's payment was not made as a donation, but had to have been made because Sarpy County thought it may have been liable. The policy does not say that it must be paid by persons who are *found* to be legally responsible, but only who *may* be legally responsible. One is hard pressed to imagine that Sarpy

County ordered its carrier to pay $175,000 to the Wayletts if it did not believe it may be responsible.

Furthermore, we believe that if the policy was intended to be limited to payments made by the driver or owner of the automobile, it would have been easy enough to say that. In the earlier part of the endorsement the driver or owner is described. The policy provides: "We will pay damages which a **covered person** is legally entitled to recover from *the owner or operator of an* ***underinsured motor vehicle*** because of bodily injury." (Emphasis supplied.) Had this been the carrier's intent, it would have been relatively easy to have inserted in the later provision that the limits of liability shall be reduced by all sums paid because of bodily injury by or on behalf of "the owner or operator of an underinsured motor vehicle." The endorsement did not so read.

We believe that we are left with no choice except to conclude that we must consider all sums paid by all persons and organizations, including Sarpy County. When that is done, the liability under the policy is reduced to zero, and there is no sum due and owing from U.S.A.A. to the Wayletts. One may argue that this seems unfair. The simple answer is, however, that that is the contract which was entered into between Waylett and U.S.A.A., and the court is not free to redraft the contract.

We believe that the district court was in error in denying the motion for summary judgment made by the appellant, and for that reason we need not consider any of the other assignments of error raised by U.S.A.A. The judgment of the district court is reversed and remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

RICHARD ANDREWS, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

401 N.W.2d 467

Filed February 20, 1987. No. 85-351.

1. **Jurisdiction: Municipal Corporations: Contracts: Claims.** Concerning a contract claim against a city of the primary class, Neb. Rev. Stat. § 15-840 (Reissue 1983) requires that such claim be filed with the city clerk and disallowed before a claimant, pursuant to Neb. Rev. Stat. § 15-841 (Reissue 1983), may timely appeal from the city's disallowance and thereby become entitled to invoke a district court's power to adjudicate the merit of the disallowed claim.
2. **Jurisdiction: Claims: Appeal and Error.** If a district court lacks power to adjudicate whether a claim is meritorious, the Supreme Court also lacks power to determine the merit of the claim which was the subject matter of the proceedings in the district court.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded with direction.

James D. Faimon, Assistant Lincoln City Attorney, for appellant.

Robert R. Gibson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

From the judgment of the district court for Lancaster County, awarding Richard Andrews $11,856 and an attorney fee for Andrews' counsel, the City of Lincoln, a city of the primary class, see Neb. Rev. Stat. § 15-101 (Reissue 1983), has appealed. We reverse and remand with direction.

Andrews, a city employee, filed his petition in the district court, seeking judgment against the city for "loss of employment, loss of wages, and humiliation and embarrassment" because the city had failed to perform its contract of employment with Andrews. In his petition, Andrews did not allege that he had filed a claim with the city regarding any amount sought to be recovered by his suit. Among its defenses, the city asserted that Andrews had failed to comply with the filing requirement of Neb. Rev. Stat. § 15-840

(Reissue 1983) concerning liquidated or unliquidated contract claims against a city of the primary class.

After a trial on the merits, and notwithstanding absence of proof that Andrews had filed his claim with the city, the district court concluded that Andrews' "petition alleges a cause of action for an unliquidated claim in contract," and then awarded Andrews judgment for $11,856 and an attorney fee.

Concerning claims against a city of the primary class, § 15-840 provides:

> All liquidated and unliquidated claims and accounts payable against the city shall (1) Be presented in writing; (2) state the name of the claimant and the amount of the claim; and (3) fully and accurately identify the items or services for which payment is claimed or the time, place, nature, and circumstances giving rise to the claim. The finance director shall be responsible for the preauditing and approval of all claims and accounts payable, and no warrant in payment of any claim or account payable shall be drawn or paid without such approval. In order to maintain an action for a claim, other than a tort claim as defined in section 23-2402, it shall be necessary, as a condition precedent, that the claimant file such claim within one year of the accrual thereof, in the office of the city clerk, or other official whose duty it is to maintain the official records of a primary class city.

Neb. Rev. Stat. § 15-841 (Reissue 1983) states in part:

> Any taxpayer of the city, after the allowance in whole or in part of any liquidated or unliquidated claim, or the claimant, after the disallowance in whole or in part of any such claim, may appeal therefrom to the district court of the county in which the city is situated in accordance with the procedures set forth in sections 15-1201 to 15-1205.

Neb. Rev. Stat. §§ 15-1201 to 15-1205 (Reissue 1983) express the statutory provisions for an appeal to and hearing in the district court.

The city assigns 20 errors regarding the district court's judgment, including the district court's failure to find that Andrews had not complied with § 15-840—the requirement that all liquidated and unliquidated claims be filed in the office

of the city clerk. Andrews responds that his

> claim is an unliquidated claim in contract seeking consequential damages which require judicial action to determine, and his action is founded in the common law of contracts. The legislature has provided District Court jurisdiction for actions in contract, and a five-year statute of limitations, with no exceptions or reservations for actions against governmental subdivisions.

Brief for Appellee at 16.

There is no evidence, and Andrews does not contend, that any claim was filed by Andrews before he commenced the action in the district court.

A contract claim against a city of the metropolitan class was involved in *Bolan v. Boyle*, 222 Neb. 826, 387 N.W.2d 690 (1986), when the plaintiffs, without first filing their claim with the appropriate municipal officer, brought an original action in the district court to collect wages for overtime. In *Bolan* we stated:

> Generally, before a court may acquire jurisdiction over a claim against a city of the metropolitan class, the procedures set out in § 14-804 [filing a verified claim with the city comptroller] must be followed. . . . No evidence showing that plaintiffs followed the procedures set out in § 14-804 was presented to the district court. Jurisdiction did not attach in the district court, and, therefore, this court has no jurisdiction to consider the matter further. [Citations omitted.]

Id. at 827-28, 387 N.W.2d at 691-92.

In *Bolan* we concluded that "[t]he district court was correct in finding that it lacked jurisdiction, and its dismissal of [plaintiffs'] petition is affirmed." *Id.* at 828, 387 N.W.2d at 692.

Shortly after *Bolan v. Boyle, supra*, this court decided *Coffelt v. City of Omaha*, 223 Neb. 108, 388 N.W.2d 467 (1986), which involved a city employee's original action in the district court, a suit based on the city's breach of contract regarding failure to pay disability benefits accruing as the result of the plaintiff's employment with the city. Coffelt had failed to file his contract claim with the city of Omaha, a city of the metropolitan class. Referring to Neb. Rev. Stat. § 14-804

(Reissue 1983) and *Bolan, supra*, we reasoned:

> Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent. [Citation omitted.]
>
> . . . .
>
> In Coffelt's case the district court never acquired jurisdiction regarding the second cause of action [breach of contract] contained in Coffelt's petition. Consequently, this court, as well, has no jurisdiction to review any issue raised in the second cause of action contained in Coffelt's petition.

223 Neb. at 110-11, 388 N.W.2d at 469-70.

Section 15-840 prescribes a procedural prerequisite concerning contract claims, liquidated or unliquidated, against a city of the primary class: "In order to maintain an action for a claim . . . it shall be necessary, as a condition precedent, that the claimant file such claim . . . in the office of the city clerk . . . ."

Andrews did not file his claim with the city and, therefore, has not complied with § 15-840. Concerning a contract claim against a city of the primary class, § 15-840 requires that such claim be filed with the city clerk and disallowed before a claimant, pursuant to § 15-841, may timely appeal from the city's disallowance and thereby become entitled to invoke a district court's power to adjudicate the merit of the disallowed claim. Without the prerequisite filing of Andrews' contract claim in compliance with § 15-840, and appeal after disallowance, the district court lacked power to decide whether Andrews' contract claim was meritorious. If the district court lacked such power, the Supreme Court also lacks the power to determine the merits of Andrews' claim.

However, because the district court lacked jurisdiction, that is, power to adjudicate the merit of Andrews' claim, the district court improperly entered judgment in favor of Andrews. "Jurisdiction is the inherent power or authority to decide a case . . . ." *State ex rel. Bauersachs v. Williams*, 215 Neb. 757, 759, 340 N.W.2d 431, 433 (1983). Therefore, we reverse the judgment of the district court and remand this matter with the direction to dismiss Andrews' petition.

REVERSED AND REMANDED WITH DIRECTION.

IN RE COMPLAINT OF FECHT.
JOHN A. FECHT, SUPERVISOR, WAREHOUSE DEPARTMENT, NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, V. ASPEGREN GRAIN & FERTILIZER, INC., ET AL., APPELLEES, FRENCHMAN VALLEY FARMERS COOPERATIVE, INC., ASSIGNEE, APPELLANT.

401 N.W.2d 470

Filed February 20, 1987. No. 85-441.

1. **Public Service Commission: Jurisdiction.** The Nebraska Public Service Commission lacks jurisdiction to construe the provisions of Neb. Rev. Stat. § 88-503(3)(b) (Supp. 1983) or of any bond provided pursuant thereto.
2. **Supreme Court: Jurisdiction: Appeal and Error.** The Nebraska Supreme Court acquires no jurisdiction of a cause appealed from a tribunal which lacked subject matter jurisdiction.

Appeal from the Nebraska Public Service Commission. Appeal dismissed.

James D. Owens of Owens and Owens, for appellant.

John C. Hahn and Gene T. Oglesby, for appellees Aspegren Grain & Fertilizer et al.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

As briefed and argued, this appeal by Frenchman Valley Farmers Cooperative, Inc., seeks to reverse the Nebraska Public Service Commission's decision not to file a district court suit on the bond that Continental Western Insurance Company provided on behalf of Aspegren Grain & Fertilizer, Inc., a public grain warehouse then licensed by the commission. We dismiss the appeal for lack of jurisdiction.

From August through December of 1983, four corn producers undertook to sell corn to the cooperative. Because it lacked storage space, a representative of the cooperative contacted an Aspegren Grain representative and determined the price Aspegren Grain would pay for the corn. Upon the producers' agreement to sell at that price, the cooperative took delivery of the corn and gave the producers a warehouse

receipt. The cooperative in turn delivered the corn to Aspegren Grain, which issued warehouse receipts in the names of the producers. The producers apparently surrendered the warehouse receipts issued by the cooperative and Aspegren Grain to the cooperative. In some manner which is not entirely clear from the record, it appears the receipts issued by Aspegren Grain were ultimately returned to it. One of the producers received payment for the corn from the cooperative in the fall of 1983, when he delivered the corn. The other three did not wish to receive payment until after January 1984, and, therefore, the cooperative did not pay them until then. Aspegren Grain, however, failed to reimburse the cooperative for the payments it had made to the producers.

The cooperative thereupon took purported assignments of the producers' separate claims against Aspegren Grain and filed a complaint with the commission, seeking to recover its losses from the bonding company. Thereafter, the commission, through John A. Fecht, the supervisor of its warehouse department, filed a complaint calling upon Aspegren Grain to show cause why its license should not be revoked. In deciding that the cooperative should "go hence with its claim to a proper tribunal," the commission concluded that the bond did not cover "deferred-payment" contracts such as those involved in the instant case. (It appears the commission overlooked that one of the producers had received payment upon delivery of the corn to the cooperative.)

While the bond is not in the record, it was provided under a statute which at the relevant time provided:

> Before any license is issued to any applicant, such applicant shall file with the commission a bond or certificate of deposit in such sum as the commission may require, and on a form and in a manner prescribed by the commission, which shall not be less than one thousand dollars for any warehouseman receiving grain from producers in wagon or truckload lots and not less than twenty-five thousand dollars for warehousemen receiving grain in carload lots. The bond and the certificate of deposit shall run to the State of Nebraska and be for the benefit of all persons storing grain in such warehouse and

> persons holding checks for the purchase of grain which were issued by the warehouseman not more than five business days prior to the cutoff date of operations for the warehouse, which shall be the date the commission officially closes the warehouse. The bond shall be conditioned upon such warehouseman carrying combustion, fire, lightning, and tornado insurance sufficient to cover loss upon all stored grain in such warehouse, and the delivery of all stored grain or payment of the value thereof upon the surrender of the warehouse receipt, and upon the faithful performance by the warehouseman of all the provisions of law relating to the storage of grain by such warehouseman, and regulations of the commission relative thereto. The commission may require such increases in the amount of such bond or certificate of deposit, from time to time, as it may deem necessary for the protection of the storage receipt holders. The surety on the bond must be a surety company holding a certificate of the Department of Insurance of the State of Nebraska authorizing it to execute the same.
>
> The bond or an attachment to the certificate of deposit shall particularly describe the location of the warehouse intended to be covered by the bond or certificate. The liability of the surety on the bond shall not accumulate for each successive license period the bond covers. The total liability of the surety shall be limited to the amount stated on the bond or as charged by an appropriate rider or endorsement to the bond.

Neb. Rev. Stat. § 88-503(3)(b) (Supp. 1983).

Thus, the first question to be resolved is whether the commission possessed jurisdiction to construe the foregoing statute and determine whether a bond provided pursuant to its provisions covered the cooperative's claims.

As observed in *In re Complaint of Fecht*, 216 Neb. 535, 344 N.W.2d 636 (1984), the commission's jurisdiction over public grain warehouses is limited to such as is granted by statute.

At the time the commission made its decision in this case, Neb. Rev. Stat. § 88-515(3) (Reissue 1981) provided:

> In the event that the commission determines that a

shortage of grain exists at a duly licensed warehouse, necessitating the closing of the warehouse, the commission may:

(a) Take title to all grain stored in the public grain warehouse at that time in trust, for distribution on a pro rata basis to all valid owners, depositors, or storers of grain who shall be holders of evidence of ownership of grain. Such distribution can be made in grain or in proceeds from the sale of grain; or

(b) Commence a suit in district court for the benefit of owners, depositors, or storers of grain.

The commission may deposit the proceeds from the sale of grain under subdivision (a) of this subsection in an interest-bearing trust account for the benefit of the valid owners, depositors, or storers of grain.

There is nothing in that statute, or elsewhere in Neb. Rev. Stat. ch. 88, art. 5 (Reissue 1981 & Cum. Supp. 1984), which purports to empower the commission to construe the provisions of § 88-503(3)(b) or any bond provided thereunder. (Whether such a statute, if enacted, would constitute an unconstitutional conferrence upon the commission of judicial power in violation of Neb. Const. art. II, § 1, is a question not involved in this action.)

Thus, the commission lacked subject matter jurisdiction over the merits of the cooperative's claims against the bonding company. That being so, this court also lacks jurisdiction to determine the merits of the claims, for this court acquires no jurisdiction of a cause appealed from a tribunal which lacked subject matter jurisdiction. *Andrews v. City of Lincoln, ante* p. 748, 401 N.W.2d 467 (1987); *Wood v. Tesch,* 222 Neb. 654, 386 N.W.2d 436 (1986); *Glup v. City of Omaha,* 222 Neb. 355, 383 N.W.2d 773 (1986); *Moell v. Mennonite Deaconess Home & Hosp.,* 221 Neb. 168, 375 N.W.2d 618 (1985).

Accordingly, we dismiss the cooperative's appeal for lack of jurisdiction.

APPEAL DISMISSED.

BETTY MARIE KUNZIE, APPELLANT, V. EDWARD GEORGE KUNZIE, APPELLEE.

401 N.W.2d 164

Filed February 20, 1987. No. 85-598.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

Gregory N. Lohr, for appellant.

Kurt A. Hohenstein of Rager & Hohenstein, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The petitioner wife, Betty Marie Kunzie, appeals from the decree dissolving her marriage to the respondent husband, Edward George Kunzie, on the bases that the trial court erred in its property division, in failing to award alimony, and in the amount of the attorney fee awarded to her. Having reviewed the record de novo as we are required to do, we conclude that the trial judge did not abuse his discretion in any regard.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

MARY J. NELSON, APPELLANT, V. EUNICE L. CHENEY AND NEWEL S. CHENEY, WIFE AND HUSBAND, APPELLEES.

401 N.W.2d 472

Filed February 20, 1987. No. 85-600.

1. **Fraud.** In order to maintain an action for false representation, the plaintiff must allege and prove by a preponderance of the evidence the following elements: (1) that a representation was made; (2) that the representation was false; (3) that, when made, the representation was known to be false, or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that he or she suffered damage as a result.

2. **Fraud: Vendor and Vendee.** In order to maintain an action for damages for fraudulent concealment or false representation by suppression or concealment in the vendor/purchaser setting, the plaintiff must allege and prove by a preponderance of the evidence the following elements: (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Reversed and remanded for further proceedings.

Clyde F. Starrett, for appellant.

Fred T. Hanson and John F. Hanson of Hanson & Hanson, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

On January 12, 1982, the plaintiff, purchaser of certain residential real estate in McCook, Nebraska, filed a petition against the defendants, vendors of that real estate, which prayed for damages due to alleged termite infestation at the time of the sale. Thereafter, the plaintiff, in response to various orders of the district court for Red Willow County, filed four amended petitions. On August 28, 1984, the defendants moved to strike the fourth amended petition from the files on the ground that it contained substantially the same allegations as the third amended petition, as to which a demurrer had been sustained and leave granted to amend. On October 9, 1984, the motion came on for hearing. The court found the facts in the fourth amended petition did not amount to misrepresentation or fraudulent concealment and there appeared to be no reasonable possibility that a cause of action against the defendants could be stated. The court sustained the defendants' motion to dismiss and dismissed the plaintiff's case. The plaintiff has appealed.

The plaintiff assigns as error the dismissal of her fourth

amended petition for failure to allege facts sufficient to constitute a cause of action. We reverse and remand.

The facts as alleged in the fourth amended petition are as follows: A purchase agreement for the sale of the defendants' home was entered into between the parties on February 22, 1978. Prior to signing the agreement, plaintiff made a demand on the defendants' agent that a termite inspection be done. In response to that demand, the agent said it had been done and he had the papers at his office. The plaintiff accompanied the agent to his office, where he showed the plaintiff a Lystads, Inc., 5-year termite-proofing guarantee bond. The plaintiff did not get a chance to examine it closely on that day. The agent said he would deliver the bond to the lender prior to the closing of the sale. The sale was closed on March 7, 1978, at which time the bond was delivered to the plaintiff.

The petition further stated that in July of 1979 the plaintiff discovered termite damage in the home. The plaintiff contacted Lystads and from that company learned there had been termite damage to the premises in October 1977 and that the defendants knew of this damage at the time of the sale to the plaintiff. The petition then alleged that the defendants

> intended to deceive Plaintiff as to the termite damage or in the alternative the representations as to the termites was [sic] so recklessly made when the [defendants] should have known the extent of the damage to the said property from termites and should have advised Plaintiff about termites, that [defendants] by their actions asserted that the property was free of such termite damage and that the Plaintiff, relying on such statements and actions of the [defendants] or their agents, suffered loss because of the termite damage.

Finally, the plaintiff alleged it was not possible to discover the termites by a usual and ordinary inspection of the property prior to purchase.

The plaintiff in this case was apparently proceeding under the theories of false representation and fraudulent concealment. In order to maintain an action for false representation, the plaintiff must allege and prove by a preponderance of the evidence the following elements: (1) that a

representation was made; (2) that the representation was false; (3) that, when made, the representation was known to be false, or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that he or she suffered damage as a result. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

The plaintiff contends the defendants represented the property was free of termite damage at the time of the sale. We disagree. The only allegation of any representations made by the defendants with regard to termites was that relating to the giving of the termite-proofing bond to the plaintiff in response to her request that a termite inspection be done. That bond, which is incorporated in the pleading, states Lystads agreed to treat the premises for the extermination and control of subterranean termites for a period of 5 years from October 6, 1977, for $495, payable upon completion of the treatment. Lystads also agreed to return to the premises if termite reinfestation occurred within the 5-year guarantee period.

The use of the words "extermination" and "reinfestation" clearly indicates that termites were found on the premises in October of 1977 and that Lystads agreed to exterminate them at that time. When this bond was given to the plaintiff, it constituted a representation by the defendants of just those things—that there were termites in October of 1977 and that Lystads agreed to exterminate them. There was no representation made as to the status of the termites at the time of the sale or as to the status of any damage done by the termites which had been found in 1977. Thus, the plaintiff failed to state facts sufficient to constitute a cause of action for false representation as to the condition of the premises at the time of the sale.

The plaintiff did not, however, base her petition solely upon the theory of false representation, but also pled facts based on the theory of fraudulent concealment. What constitutes a cause of action for fraudulent concealment in the vendor/purchaser setting in Nebraska is somewhat unclear. The elements of fraudulent concealment have been stated in basically two

different ways, one which includes "intent to deceive" as an element and one which does not. The first rule, initially found in *Linton v. Sheldon*, 98 Neb. 834, 839, 154 N.W. 724, 725-26 (1915), is as follows:

> "If, with the *intent to deceive*, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

(Emphasis supplied.)

The other often-quoted articulation of the elements of fraudulent concealment was first found in *O'Shea v. Morris*, 112 Neb. 102, 104, 198 N.W. 866, 867 (1924):

> [A]s between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or to mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; but where such facts are known by the vendor and he knows them to be not within reach of the reasonably diligent attention, observation and judgment of the purchaser, and they are such as would readily mislead the purchaser as to the true condition of the property, the vendor is bound to disclose such facts . . . .

In the most recent case of fraudulent concealment in the vendor/purchaser setting, *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985), both of these rules were quoted without discussion that one required an "intent to deceive" while the other did not. In passing, however, we did state that one of the necessary elements, "intent to deceive," was not present in the facts of that case and therefore the action for fraudulent concealment failed. *Id.* at 56, 361 N.W.2d at 197.

Christopher v. Evans, supra, was, however, decided before *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986), the case in which we determined that "intent to deceive" was not a necessary element of a cause of action for false representation. We did this in order to permit one to recover because of a statement made by a defendant who, although not making a misstatement of a material fact with a "bad motive," nevertheless made it so recklessly, without having proper knowledge from a reasonable inquiry, that "[t]he fact that the defendant deceives, itself, establishes scienter even though the defendant may have been unaware of the deception." *Id.* at 271, 388 N.W.2d at 846.

Although an action for fraudulent concealment is sometimes referred to as an action for false representation by suppression or concealment, we do not believe it wise or good public policy to adopt a theory of negligent concealment in the vendor/purchaser setting. This is notwithstanding the language found in *Dargue v. Chaput*, 166 Neb. 69, 85, 88 N.W.2d 148, 158 (1958): "Considering the entire situation, which we have set out in rather full detail, we can come to no other conclusion than that Chaput either knew, or should have known, of the faulty construction by Keenan in building the house purchased by the Dargues." However, this statement must be read in light of the facts and findings in that case, some of which are set out in some detail:

> The question then arises, was Chaput aware of these conditions? The evidence discloses that Chaput had, through experience, considerable knowledge concerning drainage and that he was fully acquainted with the land on which the house at 8525 Bellevue Boulevard was built since it was part of a tract he had owned since 1948 and which was only some 200 feet from where he lived at 8521 Bellevue Boulevard. After the construction of the house began at 8525 Bellevue Boulevard he was there at least as often as once a week. When there he would look over the construction and confer with Keenan about different features thereof and make suggestions in regard thereto. When the crack occurred in the west wall as the result of the caterpillar incident Keenan contacted Chaput about it

> and, as a result, the steel beam supports were put on the inside of the west wall. At that time Chaput must have observed the fill that was being made west of the house, the effect it was having and would have on the west wall, and what was being done to take care of the water that would naturally fall and flow thereon. We do not think Chaput is now in a position to say he did not know what was being done by Keenan in this respect.

Id. at 83-84, 88 N.W.2d at 157.

In other words, the *holding* of the court was not that from the circumstances then existing a reasonable person should have known that the facts existed but, rather, that from those circumstances it could only be said that the defendant did know the facts.

We believe this statement supports a holding that to establish a case of fraud by reason of concealment or suppression, the vendor must have known the existence of the material fact, which was deliberately withheld from the purchaser with the intent that the purchaser be misled. Additionally, of course, the existence of such fact must not have been equally within the knowledge or reach of the purchaser. *Linton v. Sheldon*, 98 Neb. 834, 154 N.W. 724 (1915).

We therefore hold that in order to maintain an action for damages for fraudulent concealment in the vendor/purchaser setting, the plaintiff must allege and prove by a preponderance of the evidence the following elements: (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.

Under this rule the plaintiff pled sufficient facts to state a cause of action for fraudulent concealment of termite damage. The facts that plaintiff did not insist on a new termite inspection and received notice of the prior termite infestation raise a jury question as to whether it was reasonable for her to have been

misled as to the true condition of the property. Accordingly, the judgment of the district court sustaining the defendants' motion to dismiss is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ANNE MARIE FERGUSON, APPELLEE AND CROSS-APPELLANT, V. BRUCE LEROY FERGUSON, APPELLANT AND CROSS-APPELLEE.
401 N.W.2d 165

Filed February 20, 1987. No. 85-613.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Avis R. Andrews, for appellant.

William G. Line and David G. Hartmann of Kerrigan, Line & Martin, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Bruce LeRoy Ferguson has appealed from the order modifying his obligation to pay child support. He assigns as error the trial court's temporary reduction of the child support, the amount of the reduction, the reassignment of the costs of transporting the children for visitation, that the appellee was not required to investigate the possibility of obtaining medical insurance for the children through her present husband's employer, and that the decree was not modified retroactively to the date the application for modification was filed. The appellee has cross-appealed, contending the trial court erred in finding a material change of circumstances had occurred and in reducing the child support payments.

After reviewing the record de novo, we conclude the trial court did not abuse its discretion in modifying the child support obligation. The judgment is, therefore, affirmed.

AFFIRMED.

IN RE INTEREST OF A.W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. T.M.W., APPELLANT.

401 N.W.2d 477

Filed February 20, 1987. No. 86-550.

1. **Appeal and Error.** Where an appellant to the Nebraska Supreme Court fails to assign any specific error, the decision appealed from will be affirmed unless the court elects to note plain error.
2. **Service of Process: Notice.** A reasonably diligent search for the purpose of justifying service by publication does not require the use of all possible or conceivable means of discovery, but is such an inquiry as a reasonably prudent person would make in view of the circumstances and must extend to those places where information is likely to be obtained and to those persons who, in the ordinary course of events, would be likely to receive news of or from the absent person.
3. _____: _____. Whether all reasonable means to qualify a search as a "reasonably diligent" one have been exhausted must be determined by the circumstances of each particular case.
4. **Due Process.** The opportunity to be heard is a fundamental aspect of due process.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Reversed and remanded with direction.

Steven Lefler of Lefler Law Firm, for appellant.

Donald L. Knowles, Douglas County Attorney, and Francis T. Belsky, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

T.M.W. appeals from the juvenile court's termination of her rights as the mother of her 6-year-old son and from the overruling of her motion to vacate the judgment of termination. We reverse with direction.

We note at the outset that appellant's brief fails to assign any specific error. In such a circumstance the decision appealed from will be affirmed unless this court elects to note plain error. *Reynolds v. Myers, ante* p. 509, 398 N.W.2d 722 (1987); *In re Interest of P.W., ante* p. 197, 397 N.W.2d 36 (1986); Neb. Rev. Stat. § 25-1919 (Reissue 1985); Neb. Ct. R. of Prac.

9D(1)d (rev. 1986). In this instance appellant's arguments suggest the presence of an issue having constitutional magnitude, which we analyze in order that we may determine whether plain error exists.

The State filed a petition on October 18, 1985, alleging that appellant had abandoned her son by leaving him with her mother on December 4, 1984, and praying that, among other things, the juvenile court terminate the appellant's parental rights. The juvenile court placed the child in temporary foster care on the day the petition was filed. Thereafter, on October 31, 1985, an employee of the juvenile court filed a motion for service by publication, which was combined with an affidavit reciting that he had contacted the "proper persons or officials at the following places":

> Omaha City Directory; Northwestern Bell Telephone Company; Omaha Public Power District; Metropolitan Utilities District; Drivers License Bureau; Department of Corrections-710 So. 17th St.; Jail, City of Omaha; United States Post Office; Archbishop Bergan Mercy Hospital; Bishop Clarkson Memorial Hospital; Douglas County Hospital; Immanuel Medical Center; Lutheran Medical Center; Midlands Community Hospital; Nebr. Methodist Hospital; Nebraska Psychiatric Institute; St. Joseph Hospital; University of Nebraska Medical Center; Veterans Hospital; Virginia Gross, 444-6674; Lori McKeon, Probation Officer, 444-7749.

The affiant further stated that notwithstanding his "diligent search," he was unable to learn appellant's whereabouts and had been unable to serve summons upon her.

On November 4, 1985, the juvenile court entered an order to give the appellant notice by publication. Thereafter, notice was published under the authority of Neb. Rev. Stat. § 43-268(2) (Reissue 1984), which states:

> Except as provided in section 43-264, notice, when required, shall be given in the manner provided for service of a summons in a civil action. Any published notice shall simply state that a proceeding concerning the juvenile is pending in the court and that an order making an adjudication and disposition will be entered therein. If the

> names of one or both parents or the guardian are unknown, he, she, or they may be notified as the parent or parents, or guardian of (naming or describing the juvenile) found (stating address or place where the juvenile was found). Such notice shall be published once each week for three weeks, the last publication of which shall be at least five days before the time of hearing.

The publication was completed on November 26, 1985, and a dispositional hearing was held on February 3, 1986, at which time appellant's rights in and to her son were terminated. On February 11, 1986, appellant filed her motion to vacate that judgment, alleging that she had not been given proper notice.

As noted earlier, § 43-268(2) requires that in a juvenile proceeding, with an exception not relevant to this action, notice shall be given as in "a civil action." Neb. Rev. Stat. § 25-517.02 (Reissue 1985) provides that service may be made by publication upon a "motion and showing by affidavit that service cannot be made with reasonable diligence by any other method provided by statute." Thus, appellant correctly maintains that service by publication under § 43-268(2) can only be made after a reasonably diligent search fails to locate the party to be served.

A reasonably diligent search for the purpose of justifying service by publication does not require the use of all possible or conceivable means of discovery, but is such an inquiry as a reasonably prudent person would make in view of the circumstances and must extend to those places where information is likely to be obtained and to those persons who, in the ordinary course of events, would be likely to receive news of or from the absent person. See, *Donea v. Massachusetts Mutual Life Insurance Co.*, 220 Minn. 204, 19 N.W.2d 377 (1945); *Ryken v. State*, 305 N.W.2d 393 (S.D. 1981); *Turnquist v. Kjelbak*, 77 N.W.2d 854 (N.D. 1956). Whether all reasonable means have been exhausted must be determined by the circumstances of each particular case. *Ryken v. State, supra.*

During the detention hearing on November 4, 1985, appellant's mother testified that she had last heard from appellant some 5 months earlier, at which time appellant was living in Oxnard, California. At that time appellant, according

to her mother, said she was going "underground for a while" because she had written a bad check and the police were looking for her. While appellant's mother indicated she would give the juvenile court any new address she should receive for appellant, she was not asked what address she last had, if any.

Virginia Gross, one of the persons referred to in the aforedescribed affidavit, is a caseworker employed by "Child Protective Services, State of Nebraska." She testified during the adjudication hearing held December 9, 1985, that she had talked with appellant's mother sometime during September and again on October 8, 1985. Appellant's mother said her daughter reported she was "on the lam" in California. Gross testified that the mother "was unable to give an address" for appellant.

Lori McKeon, the other individual mentioned in the affidavit, was a probation officer employed by the juvenile court. She prepared a report dated January 23, 1986, which was received in evidence during the dispositional hearing held February 3, 1986, stating that appellant's whereabouts were unknown. The report does not show the basis of that statement.

In testifying on May 9, 1986, in support of her motion to vacate the termination judgment, appellant testified that she lived at 223 East Lark, Oxnard, California, and that her mother always knew that address. The evidence in support of the motion also reveals that an Omaha employee of the Nebraska Department of Social Services, "on a referral from the ADC office," undertook, beginning February 14, 1985, to determine appellant's ability to pay child support. As a result of that effort, it was determined by July 8, 1985, that appellant lived at 223 East Lark, Oxnard, California, and that to the best of this person's knowledge she remained at that address from then on.

It is significant that the person charged with the responsibility to locate appellant, remarkably enough an employee of the very court required to pass upon the quality of the search, did not himself contact appellant's mother. A reasonably prudent person could reasonably expect appellant's mother to receive news of or from appellant. It is also significant that neither he nor anyone else asked appellant's mother what address she last had for appellant. The mother's testimony does not contradict appellant's claim that the mother

at all times had the Oxnard, California, address because the mother at no time said she never had a California address for appellant. The fact appellant said she was seeking to avoid the police does not mean she was not where she had told her mother she was. In any event, a search which makes no effort to determine where the subject of the search was last known to be and which makes no effort to check whether the subject is still there cannot be considered reasonably diligent. As a consequence of the failure to make proper inquiry, the search for appellant focused in Omaha, where she was known not to be, rather than in Oxnard, California, where she had been known to be.

The opportunity to be heard is a fundamental aspect of due process. *Greene v. Lindsey*, 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982); *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); *Grannis v. Ordean*, 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363 (1914); *Masid v. First State Bank*, 213 Neb. 431, 329 N.W.2d 560 (1983); *Tuch v. Tuch*, 210 Neb. 601, 316 N.W.2d 304 (1982). In this instance appellant was impermissibly denied such opportunity by a less than reasonably diligent search to determine her whereabouts.

Accordingly, the record demonstrates plain error which requires that the order overruling appellant's motion to vacate the termination judgment be reversed. The matter is remanded to the juvenile court with the direction that it vacate, set aside, and hold its termination order for naught and for such further proceedings as are appropriate under the law.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. KEN SLUYTER, APPELLANT.
401 N.W.2d 480

Filed February 20, 1987. No. 86-562.

1. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the court's sound discretion, and absent a showing of an abuse of that discretion the trial court's ruling will not be disturbed on appeal.

2. **Motions for Continuance.** There is no abuse of discretion by the court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result of that denial.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

David W. Jorgensen of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

This is an appeal of defendant's conviction by a jury of one count of theft by deception, in violation of Neb. Rev. Stat. § 28-512 (Reissue 1985), and two counts of failure to appear, in violation of Neb. Rev. Stat. § 29-908 (Reissue 1985). The only error assigned by defendant is that the district court erred in overruling defendant's motion for a continuance so that he could obtain a different attorney. We affirm.

The record discloses that in an information filed on February 25, 1986, the defendant was charged with one count of theft by deception occurring on October 7, 1983, and two counts of failure to appear before the county court, on September 30, 1984, and on February 22, 1985. The charge of theft by deception involved the defendant's alleged obtaining of property belonging to Kenneth Hervert. The defendant received a pickup truck from Hervert in exchange for a pickup truck which the defendant represented he owned but, in fact, did not. The failure to appear charges arose out of the defendant's failure to appear in county court on two occasions in proceedings concerning the theft charge. Shortly after defendant's arrest in January or February 1986, the public defender of Buffalo County was appointed to represent defendant. The public defender represented defendant at a preliminary hearing and, later, at the arraignment in these proceedings on April 3, 1986. At that time the defendant was present with the public defender and entered pleas of not guilty

on all charges. Trial was set for the jury session commencing May 12, 1986.

On the day trial was to begin, the defendant appeared in court with a different attorney, David Jorgensen. Jorgensen stated he appeared for defendant only to seek a continuance of the trial, with the understanding that if the continuance was denied, Jorgensen would not represent defendant further and the public defender would represent defendant in the jury trial. A hearing on the oral request for a continuance was held immediately. At the hearing the defendant testified that he had been living in Oklahoma "for some part of this time between February and now [May 12, 1986]." He further testified that he returned to Nebraska twice during that time in connection with his case, once for the preliminary hearing and once for his current appearance for trial. Defendant testified that he did try to call the public defender on several occasions regarding his case.

Gary Hogg, the public defender assigned to represent the defendant, testified that on April 15, 1986, he sent the defendant a letter requesting information concerning witnesses to be used in the defense. This letter stated: "Per our previous conversations, it is necessary that you get me the information concerning witnesses and what they are going to say, in writing, as soon as possible, or I will not be able to adequately prepare for your defense, the jury trial session in May." The letter also contained a handwritten addition, as follows: "P.S.—I need the information on or before 21 April 1986, to begin adequate preparation for trial & that's pressing the time frame." Hogg testified that he received no written response to this letter, although he had further telephone conversations with defendant.

The district court overruled defendant's motion for a continuance. A jury was selected on May 12 and the case tried to that jury on May 13 and 14. The defendant was subsequently convicted on all three charges and was sentenced to the Nebraska Penal and Correctional Complex for a term of 6 months on the charge of theft and 1 year on each of the charges of failure to appear. The 1-year sentences were to be served concurrently, but consecutively to the 6-month sentence on the

theft charge.

The defendant alleges in his appeal that the district court erred in failing to sustain his motion for a continuance so that new counsel could be obtained. In Nebraska it has been held that a motion for continuance is addressed to the court's sound discretion, and absent a showing of an abuse of that discretion the trial court's ruling will not be disturbed on appeal. *State v. Polyascko, ante* p. 272, 397 N.W.2d 633 (1986); *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986). We further held in *Lynch* at 859-60, 394 N.W.2d at 660, "There is no abuse of discretion by the court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result of that denial."

The bill of exceptions filed herein contains only the proceedings of the hearing on defendant's motion for a continuance and the hearing on the motion for a new trial after defendant's conviction. There is no record before us as to the trial itself, and thus no showing whether the defendant was prejudiced or not as a result of the denial of the motion for continuance. The record shows that Hogg's alleged inadequacies in subpoenaing defense witnesses were largely due to defendant's failures to provide names, addresses, and possible testimony of such witnesses. It would appear that defendant's attitude as displayed in his two previous failures to appear in court carried over to his failure to cooperate with his attorney in his trial on those same two charges.

There was no abuse of discretion on the part of the trial court in refusing to grant the defendant's motion for continuance. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEE A. DAVIS, APPELLANT.
401 N.W.2d 165

Filed February 20, 1987. No. 86-706.

Mental Competency: Pleas: Appeal and Error. The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Anthony S. Troia, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

Defendant, Lee A. Davis, appeals his conviction and sentence to 6 to 10 years in the Nebraska Penal and Correctional Complex on one count of burglary in violation of Neb. Rev. Stat. § 28-507 (Reissue 1985), following his plea of guilty to that charge. The defendant alleges the district court erred in accepting defendant's plea "when it was obvious that Mr. Davis was on medication, that he had been diagnosed as having both medical and emotional problems and was not competent enough to understand his actions." For the reasons stated below, the judgment of the district court is affirmed.

On March 17, 1986, an information was filed in the district court for Douglas County charging the defendant with one count of burglary, in that on October 2, 1985, the defendant willfully, maliciously, and forcibly entered a building occupied by Ak-Sar-Ben Metals with intent to steal property. The defendant initially entered a plea of not guilty. On June 13, 1986, the defendant, with counsel, withdrew his not guilty plea and entered a plea of guilty.

Before accepting the plea of guilty the court inquired, in detail, as to whether the defendant was fully aware of the nature of the proceedings and if defendant understood the questions the court directed to him. Defendant answered in the affirmative. The court ascertained that defendant was on medication for a "nerve problem" and specifically inquired if defendant had any difficulty with going forward with the hearing because of the medication. The defendant answered in the negative and stated he wished to proceed. The court then meticulously advised defendant of all of his constitutional rights, examined the defendant and determined that he

understood those rights, and told defendant of the possible range of penalties for burglary. After explaining the nature of the crime to defendant, the court then established the factual basis for the plea by statements from the defendant himself and from the county attorney. The arraignment complied in every respect with the standards recently set out in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), decided October 10, 1986.

The factual allegation set out in defendant's assignment of error, stating that it was obvious that defendant was not competent at the time of his plea, is not supported in any way in the record before us. At the conclusion of the arraignment the district court found

> beyond a reasonable doubt that the defendant understands the nature of the charge against him to which he has pled guilty, that he understands the possible sentence thereunder, that the plea is made freely, knowingly, intelligently and voluntarily, and that the plea is accurate and that there is a basis in fact for the defendant's offered plea of guilty.

The evidence in the record fully supports the trial court's finding.

The conclusion that must be drawn from such finding is that defendant was competent at the time of his plea. The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding. As we held in *State v. Teater*, 217 Neb. 723, 725, 351 N.W.2d 60, 62 (1984), "The district court's finding that Teater was mentally competent to stand trial will not be disturbed unless there is insufficient evidence to support that finding. The test of mental capacity to plead or stand trial is the same."

To reinforce the correctness of the court's finding, we note that at the sentencing hearing the trial court offered defendant an opportunity to withdraw his plea of guilty. At that time defendant again informed the court that he was guilty of the crime charged, that he did not want to withdraw his plea, and that his plea of guilty was in his best interests.

There is no merit in defendant's assignment of error. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES DURAN, APPELLANT.

401 N.W.2d 482

Filed February 20, 1987. No. 86-800.

1. **Criminal Law: Sentences.** A law which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed is an ex post facto law and insofar as it affects the punishment of the party to his disadvantage is void.
2. **Criminal Law: Restitution: Sentences.** Restitution ordered by a court pursuant to Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1986) is a criminal penalty imposed as punishment for the crime, not an administrative or civil penalty as is restitution under Neb. Rev. Stat. § 28-427 (Reissue 1985).
3. **Criminal Law: Sentences.** A court is without authority to impose a criminal penalty for a crime unless the law authorizing such penalty was effective on or before the date of the commission of the crime.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed as modified.

Charles F. Fitzke, for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Pursuant to a plea of guilty the defendant was convicted of assault in the first degree, a violation of Neb. Rev. Stat. § 28-308 (Reissue 1985) and a Class III felony. He was sentenced to a term of imprisonment of from 3 to 7 years and was further ordered to pay restitution for the medical expenses of the victim. On appeal to this court his assignments of error relate solely to that portion of the sentence concerned with restitution.

The crime occurred on July 7, 1986. The plea was entered on July 25, and sentencing was had on September 4, 1986. As of the date of the crime the only penalty authorized by statute for conviction of a Class III felony was a term of imprisonment for not less than 1 year nor more than 20 years, or a fine not to exceed $25,000, or both imprisonment and fine. Neb. Rev. Stat. § 28-105 (Reissue 1985).

However, Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1986) became effective on July *17*, 1986, and provides as follows:

> A sentencing court may order the defendant to make restitution for the actual physical injury or property damage or loss sustained by the victim as a direct result of the offense for which the defendant has been convicted. Whenever the court believes that restitution may be a proper sentence or the victim of any offense or the prosecuting attorney requests, the court shall order that the presentence investigation report include documentation regarding the nature and amount of the actual damages sustained by the victim.

Neb. Rev. Stat. §§ 29-2281 et seq. (Cum. Supp. 1986) then proceed to detail the procedure whereby the amount of restitution shall be determined.

Although in his assignments of error defendant attacks the procedure employed by the district court, it is only necessary for us to address the question of the authority of that court in this instance to order restitution.

We have stated that a law which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed is an ex post facto law and insofar as it affects the punishment of the party to his disadvantage is void. *Marion v. State*, 16 Neb. 349, 20 N.W.289 (1884). Cf., *State v. McCoy*, 87 Neb. 385, 127 N.W. 137 (1910); *State v. Peiffer*, 212 Neb. 864, 326 N.W.2d 844 (1982). Thus, if restitution under the authority of § 29-2280 is an additional criminal penalty imposed as punishment for the crime, its application in this case violates the prohibitions against ex post facto laws.

In *State v. Holmes*, 221 Neb. 629, 379 N.W.2d 765 (1986), we held that restitution ordered (return of drug buy money) pursuant to Neb. Rev. Stat. § 28-427 (Reissue 1985) was in the nature of a civil or administrative penalty, not a criminal penalty imposed as punishment for the crime. Because restitution imposed under § 28-427 was not part of the sentence, we determined it could be ordered subsequent to the time of sentencing.

In making this decision we contrasted restitution pursuant to § 28-427 with restitution under the federal Victim and Witness

Protection Act of 1982, 18 U.S.C. §§ 1501 et seq. (1982), which has been held to be a criminal penalty. *United States v. Keith*, 754 F.2d 1388 (9th Cir. 1985); *United States v. Florence*, 741 F.2d 1066 (8th Cir. 1984). We stated that restitution under the federal act is required to be imposed at the time of and as a part of the sentencing procedure (18 U.S.C. § 3579), whereas § 28-427 was silent as to when an order for restitution could be made. *Holmes, supra.* Based on this distinction we determined that restitution pursuant to § 28-427 was *not* a criminal penalty.

At this time, however, we are faced with restitution ordered pursuant to § 29-2280. Restitution under § 29-2280 is made by a sentencing court "[w]henever [it] believes that restitution may be a proper sentence . . . ." The use of the words "sentencing court" and "sentence" compels the conclusion that restitution pursuant to § 29-2280 is a criminal penalty imposed as punishment for the crime, not an administrative or civil penalty as is restitution under § 28-427.

Other courts considering the same issue have disallowed restitution orders where the offense was committed prior to the effective date of the law authorizing restitution to be imposed as a part of the sentence. *Cox v. State*, 394 So. 2d 103 (Ala. Crim. App. 1981), held that such an order was unconstitutional as being ex post facto. In *State v. Crawford*, 289 Or. 151, 610 P.2d 1232 (1980), the court held that a defendant is subject to no greater penalty than that which was in effect on the date of the commission of the crime, and a sentence to include restitution under those circumstances was erroneous because it was in excess of the court's authority.

Before § 29-2280 was enacted, sentencing courts did not have the authority to order the defendant to pay restitution, except as part of an order of probation. See Neb. Rev. Stat. § 29-2262(2)(j) (Reissue 1985). Thus, the enactment of § 29-2280 made "more burdensome" the punishment of the crime the defendant committed. Whether the sentence is called ex post facto or in excess of the trial court's authority, § 29-2280 cannot be given retroactive effect to crimes committed prior to its effective date.

The judgment of the district court is modified to delete the requirement as to restitution and, as so modified, is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. DOUGLAS F. DUCHEK, RESPONDENT.
401 N.W.2d 484

Filed February 20, 1987. No. 87-116.

Original action. Judgment of suspension.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an original disciplinary proceeding brought by the State on behalf of the Nebraska State Bar Association against the respondent, Douglas F. Duchek. On September 17, 1986, respondent was charged in the U.S. District Court for the District of Nebraska with three counts of willful failure to file an income tax return in violation of I.R.C. § 7203 (1982). On September 18, 1986, the Nebraska State Bar Association filed a disciplinary complaint against the respondent in connection with the charges filed against him in the U.S. District Court. Duchek pled guilty to one count of willful failure to file an income tax return, and the remaining two counts pending against him were dropped. Respondent was sentenced to a term of 2 years' probation, a condition of which was that he must perform 350 hours of community service. Duchek admits that he has violated § 7203 and that these actions constitute a violation of his oath of office as an attorney and Canon I, DR 1-102(A)(1) and (6), of the Code of Professional Responsibility.

In view of these facts and all the circumstances disclosed by the available record, we find that the respondent's willful failure to file his income tax return as required by federal law constitutes misconduct involving moral turpitude and a violation of the standards of ethics applicable to attorneys.

DR 1-102 provides in pertinent part: "(A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (3) Engage in illegal conduct involving moral turpitude. . . . (6) Engage in any other conduct that adversely reflects on his fitness to practice law." Prior disciplinary actions before this court involving an attorney's willful failure to file income tax returns have resulted in a suspension of the respondent for a period of 1 year. *State ex rel.*

Nebraska State Bar Assn. v. Fitzgerald, 165 Neb. 212, 85 N.W.2d 323 (1957); *State ex rel. Nebraska State Bar Assn. v. Tibbels*, 167 Neb. 247, 92 N.W.2d 546 (1958); *State ex rel. NSBA v. Hahn*, 218 Neb. 508, 356 N.W.2d 885 (1984). In these cases a knowing failure to file a tax return constituted misconduct involving moral turpitude in violation of the standards of ethical procedure governing attorneys. These cases are dispositive of the case at bar and instruct us that the appropriate action to be taken is to suspend the respondent for a period of 1 year.

It is the judgment of the court that the respondent be suspended from the practice of law for 1 year from March 1, 1987. The respondent may apply for reinstatement at the end of the period of suspension by making an affirmative showing that he has fully complied with the order of suspension and in the future will not engage in practices offensive to the legal profession.

JUDGMENT OF SUSPENSION.

SHIRLENE WATSON, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLANT, V. AVCO FINANCIAL SERVICES INTERNATIONAL, INC., A NEBRASKA CORPORATION, AND GAMBLES SKOGMO, INC., A MINNESOTA CORPORATION, APPELLEES.

401 N.W.2d 485

Filed February 27, 1987. No. 44184.

Statutes. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Robert G. Hays, for appellant.

James L. Haszard of Zimmerman & Haszard, for appellee Avco Financial Services, Inc.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

Shirlene Watson, on behalf of herself and all others similarly situated, has appealed from a judgment entered by the district court for Lancaster County, Nebraska, granting summary judgment in favor of the appellees, Avco Financial Services International, Inc., a Nebraska corporation, and Gambles Skogmo, Inc., a Minnesota corporation. In granting the summary judgment, the district court did not address the issue of whether appellant could properly bring a class action. In view of the fact that we affirm the decision of the district court granting summary judgment in favor of all of the defendants and against the appellant, we also need not address that issue.

The pleadings and affidavits of the parties reveal that Watson entered into an installment sales contract with Gambles on April 19, 1978, for the purchase of certain household furniture. The total unpaid balance was in the amount of $1,300, to be repaid in 35 equal installments of $46.25 each and a final payment of the balance. The contract was thereafter sold to Avco on June 16, 1978. Watson did not make the entire payment due for the month of June 1979, and, therefore, the payment was deferred for an additional month, thereby making it a contract for 37 months. In consideration of Avco's deferring the contract for an additional month, Avco charged and received from Watson the sum of $10.09. Watson thereafter defaulted in payment, owing Avco $1,118.74.

Watson then filed this action to have the contract declared void and to recover back the charges and penalties as provided by Neb. Rev. Stat. § 45-344 (Reissue 1978), that being the law then in effect.

Watson has listed nine assignments of error. In fact there are but three issues. They are as follows: (1) Did the appellees contract for and collect an excessive time-price differential in violation of Neb. Rev. Stat. § 45-338 (Reissue 1978)? (2) Did the appellees contract for unauthorized attorney fees? and (3) Did the appellees collect an unauthorized deferment fee?

Section 45-338, in effect at the time this contract was entered

into, provided in part as follows:

> Notwithstanding the provisions of any other law, the time price differential for any goods or services sold under an installment contract shall not exceed eighteen per cent per annum on that part of the unpaid principal balance not in excess of one thousand dollars, and not exceeding twelve per cent per annum on that part of the unpaid principal balance in excess of one thousand dollars; *Provided*, a minimum time price differential of ten dollars may be charged on any installment contract. When the installment contract is payable in substantially equal and consecutive monthly installments, the time price differential shall be computed on the basic time price of each contract, as determined under the provisions of section 45-336, from the date of the contract until the due date of the final installment, notwithstanding that the time price balance is required to be paid in installments.

Appellant maintains that, under the provisions of the Nebraska Installment Sales Act, Neb. Rev. Stat. §§ 45-334 et seq. (Reissue 1978), the time-price differential must be computed by, in effect, dividing the contract in question into two contracts, one for $1,000 and one for $300. Watson further maintains that as each payment of $46.25 is made, a portion of the payment must be applied to the $1,000 principal unpaid times 18 percent and a portion of the payment must be applied to the $300 principal unpaid times 12 percent. Watson argues that by failing to calculate the time-price differential in this manner, appellees contracted for and collected charges that were $18.79 in excess of those authorized by the statute, entitling her to void the contract and recover up to the first $1,000 of the time-price differential and $4,000 of the principal of the contract. See § 45-344.

We are simply unable to grasp the argument made by Watson, nor are we able to adopt the position advanced by her. It appears to us that the statutes in question are clear on the face of the act and require no interpretation as suggested by Watson. In the instant case there was but one contract for $1,300 and not two, as suggested by Watson. As in all contracts of debt, the principal is reduced by applying payments to the total amount

of the unpaid principal due and owing, and not by dividing the contract up and in some manner applying part of the principal payment to the first sums due and owing and part of the principal payment to some part in the middle. When Watson ceased making payments in this case she owed $1,118.74, and did not owe some part of $300 in excess of $1,000 and some part of the $1,000 not in excess of $1,000.

The language of § 45-338 is clear and unambiguous. It provides that the charge "shall not exceed 18 per cent per annum on that part of the unpaid principal balance not in excess of one thousand dollars, and not exceeding twelve per cent per annum on that part of the unpaid principal balance in excess of one thousand dollars." It seems clear to us that there is but one unpaid principal balance, and that to divide the contract into two contracts with two unpaid principal balances, as suggested by Watson, is neither proper nor warranted.

As we said in *S.I.D. No. 95 v. City of Omaha*, 221 Neb. 272, 276, 376 N.W.2d 767, 770 (1985): "Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning." And, furthermore, this court is not free to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute. See *State v. Schulz*, 221 Neb. 473, 378 N.W.2d 165 (1985).

Under the provisions of § 45-338 the seller is entitled to charge the buyer 18 percent interest on that portion of the unpaid balance which is less than $1,000 and 12 percent interest on that portion of the unpaid balance in excess of $1,000. Of necessity, the 18-percent rate of interest will be charged against the $1,000 balance for a greater portion of the time that the contract remains unpaid than will be charged at 12 percent against the unpaid portion in excess of $1,000, simply because the portion not in excess of $1,000 will remain unpaid for a longer time than will the portion in excess of $1,000, which is paid first. In our view that is precisely what the act in question contemplates. Watson's argument to the effect that an excessive charge was made is simply without merit and must be overruled.

Watson's second contention is that, contrary to Nebraska law, Gambles contracted for an attorney fee, thereby entitling

Watson to void the contract and recover back the principal and interest as provided by statute. Watson concedes that no attorney fee was in fact collected. Nevertheless, Watson correctly points out that collection is not required if, indeed, a contract to pay was made. The difficulty with Watson's argument is that the language of the contract is specifically to the contrary. The contract provides: "4. DEFAULT AND BREACH OF AGREEMENT: *To the extent permitted by law*: . . . (b) Buyer will be liable for payment of all costs, including reasonable attorneys' fees, incurred in repossessing and reselling the merchandise and collecting any sums due hereunder." (Emphasis supplied.)

Watson claims that by reason of this language Gambles and Avco have indirectly contracted for unauthorized attorney fees. Whether one may contract for attorney fees under the provisions of the Nebraska Installment Sales Act is an open question and need not here be decided because the contract clearly provides that the agreement to pay is applicable only "[t]o the extent permitted by law." To the extent, therefore, that Nebraska does not permit the collection of such a fee, the contract provided that no fee may be collected, and therefore neither Gambles nor Avco contracted to collect such a fee. Watson's attempt to argue that the language of the contract is ambiguous and permits Gambles or Avco to do indirectly what it may not do directly is simply an attempt to read into the contract words which are not there. That this court may not do. The second claim is therefore without merit.

That leaves us, then, with the last issue. As the facts upon which the parties agree indicate, Watson became delinquent in her payments at some time before the contract was to be paid in full. In consideration of the payment of $10.09 by Watson, an amount less than Avco could have charged initially for the month, Avco extended the life of the contract an additional month. The fee paid was based on the fact that the amount due Avco under the contract was not to be paid for an additional month. Watson now maintains that because the statutes make no provision for a deferment fee, the receipt by Avco of this $10.09 voids the contract. Again, we believe that the argument is without merit.

It is clear to us that the $10.09 was interest for an additional month, no matter what it was called. In all of our previous cases involving installment sales we have held that we shall look to the substance of the transaction, regardless of the form. See *General Motors Acceptance Corp. v. Mackrill*, 175 Neb. 631, 122 N.W.2d 742 (1963). As an example, in *Humber v. Gibreal Auto Sales, Inc.*, 207 Neb. 286, 298 N.W.2d 363 (1980), we held that we would consider a transaction as a sale and subject to the act even though called a lease. We see no reason why we should depart from that rule where, as here, by looking through the form to the substance, it is obvious that the payment is interest permitted under the act in question.

Avco extended the contract for an additional month so that the unpaid principal balance could be paid over 37 months rather than 36 months. There was nothing illegal about that. Under the provisions of the act then in effect, an installment sales contract could have initially been entered into for up to 145 months (see § 45-335(5)). It would therefore appear to us to be an absurdity to suggest that Gambles could have initially entered into a contract with Watson for 37 months and collected interest during that entire time, but that, having once entered into the contract for 36 months, appellees' only remedy upon default by Watson was to declare the contract totally due and owing and subject either to an action for replevin or an action on the balance due. No provision of the sales act is directed to our attention, nor are we able on our own to find any provision of the act, which precludes Avco from renegotiating the contract once a default occurs, so long as the contract does not extend for more than 145 months. We believe that no violation was committed by reason of Avco's extending the time of payment for an additional month and collecting an additional month's interest.

For those reasons, therefore, the judgment of the district court granting summary judgment in favor of the appellees and against the appellant is in all respects affirmed.

AFFIRMED.

CHADD CHRISTOPHER CHIRNSIDE, A MINOR, BY AND THROUGH ELAINE A. WAGGONER, HIS GUARDIAN AND CONSERVATOR, APPELLANT, V. LINCOLN TELEPHONE & TELEGRAPH COMPANY, A CORPORATION, APPELLEE.

401 N.W.2d 489

Filed February 27, 1987. No. 85-342.

1. **Evidence: Juries: Appeal and Error.** In viewing a matter on appeal we are guided by the rule that where evidence is in conflict or reasonable minds may differ, it is normally within the province of the jury to decide issues of fact.
2. **Damages: Proof.** Impairment of earning capacity is an item of general damage, and proof may be had under general allegations of injury and damage. Proof of an actual loss of wages or earnings is not essential to a recovery for loss of earning capacity.
3. **Trial: Rules of Evidence.** When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given in evidence.
4. _____: _____. Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. When this danger is not present it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to fail to exclude all the evidence.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed in part, and in part reversed and remanded for a new trial on the issue of damages.

Warren C. Schrempp and Peter J. Hoagland of Schrempp, Hoagland, Gray & Gerdes, and Elaine A. Waggoner, for appellant.

William D. Sutter, Kile W. Johnson, and Robert W. Shively of Barlow, Johnson, DeMars & Flodman, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal from a judgment rendered by the district court on a jury verdict in favor of plaintiff-appellant in the amount of $175,000 for personal injuries suffered by appellant's ward in a pedestrian-motorist accident in Lincoln, Nebraska. Plaintiff appeals.

Several errors are assigned, and they may be stated in the

following general categories: (1) The verdict was inadequate; (2) The court failed to allow the jury to consider loss of earning capacity as an element of damages; (3) Certain evidence was erroneously admitted; (4) The court erred in failing to instruct the jury that defendant was negligent as a matter of law; and (5) The court erred in failing to give certain instructions requested by appellant and in giving certain other instructions relating to negligence and contributory negligence.

A detailed statement of the facts will be helpful in an understanding of the issues.

Appellant's ward, Chadd Christopher Chirnside, was 8 years of age on June 26, 1981, the date of the accident. Chadd was living with foster parents in Lincoln and attending summer school at Elliott School at 25th and N Streets in Lincoln. The foster parents' (Henry and Linda Rappl) residence is located at 2137 E Street. Chadd attended summer school during the morning hours to correct a perceived educational deficiency. At the time of the trial Chadd lived with his adoptive parents in Omaha.

To reach Elliott School from the Rappl residence it is necessary to cross Capitol Parkway, a divided arterial street. On the day of the accident the route taken included the intersection of Randolph Street near Lincoln High School. At the Randolph intersection the total distance from curb to curb of Capitol Parkway, including all passing and turning lanes and a median, is 85 feet. The time for crossing the intersection free of traffic on Capitol Parkway is 22 seconds. The average adult walks at a rate of 3 to 4 feet per second; thus, if an adult stepped off the curb exactly at the moment the walk sign for pedestrians crossing Capitol Parkway came on and traveled at 4 feet per second, he would have a safety margin of 3 feet and three-fourths of a second before motorists started crossing Randolph. The city of Lincoln is not a party to the action, and the safety of the intersection is not an issue.

Capitol Parkway runs in a generally southeast to northwest direction at Randolph Street. The defendant's driver and a passenger were returning from a duty assignment at approximately noon to the Lincoln Telephone & Telegraph Company building. The defendant's LT&T utility truck was

traveling in the extreme right-hand lane in a northwesterly direction, on a green light. As the truck proceeded through the intersection, the passenger, Wyman Dughman, informed the driver and his fellow LT&T employee, Gerald Harris, "There's a pedestrian in the crosswalk." Harris testified that he did not see Chadd before the accident, applied his brakes, and struck Chadd. Harris did not know the direction in which Chadd was traveling. Chadd was struck by the left front fender of the truck and was thrown and rolled a distance of 49 feet from the northernmost crosswalk stripe. Chadd has no recollection of the accident. Chadd was taken to Lincoln General Hospital; he was bleeding from his left ear, nose, and scalp. He remained in a coma or semicoma for 8 days. His left femur was fractured, and the fracture could not be reduced until 12 days after the accident. Testimony was presented to prove that as a result of the accident Chadd incurred brain damage, resulting in impaired cognitive and speaking abilities and coordination, loss of hearing on the left side, and facial sagging on the left side. The injuries manifested themselves in Chadd's garbled speech, inability to build things with boards, inability to remember his address and telephone number, twitching eyes, and lack of athletic coordination. Further surgery will be required to correct a limp caused by the necessary shortening of Chadd's left leg by three-fourths of an inch in the treatment of the fractured femur.

Extended testimony was received concerning Chadd's preaccident mental acuity and his postaccident defects in his abilities to read, spell, dress himself, communicate, and perform simple physical and recreational tasks.

The trial court submitted the allegations of negligence and contributory negligence to the jury. After the verdict, plaintiff brings this appeal.

With respect to the first assignment of error, that the verdict was inadequate, the jury found appellee negligent, and we affirm that finding. We are not convinced that the appellee was negligent as a matter of law, but in view of our decision to remand on the issue of damages no useful purpose can be had by an extended discussion of the first assignment.

We next consider whether the trial court erred in submitting

the alleged contributory negligence of Chadd, and the related question of whether the jury should have been directed on liability. In viewing the matter we are guided by the rule that where evidence is in conflict or reasonable minds may differ, it is normally within the province of the jury to decide issues of fact. *Koerner v. Perrella*, 213 Neb. 189, 328 N.W.2d 473 (1982); *Poppe v. Petersen*, 221 Neb. 877, 381 N.W.2d 534 (1986).

There is evidence from which a jury could conclude that Chadd was returning from Elliott School to the home of his foster parents (i.e., from the northeast to the southwest) and stepped into the first lane of northwestern-bound traffic of Capitol Parkway when a "Don't Walk" sign at Randolph prohibited such entry. There is further evidence that the LT&T truck entered and nearly crossed the intersection on a green light before observing Chadd. No complaint is made of instructions relating to the reduced duty of a child with respect to care for his own safety. It is sufficient to state that a jury issue was presented. The assignments are not meritorious.

We next consider the trial court's refusal to instruct the jury in assessing damages it could consider in Chadd's loss of capacity to earn in the future. At the instruction conference, the court stated:

> I'm not going to instruct on loss or impairment of future earning capacity. We have evidence from Dr. Wolcott that he would be hard pressed to get beyond high school. What that means, we don't know, in terms of dollars and cents. He'll, one would imagine, certainly, you know, have a permanent disability, and there was evidence of permanency. What that will translate into in terms of his earning capacity, I don't think there's enough evidence. Now, the evidence in that regard, I believe our Supreme Court is saying, can be rather minimal. And I've read Baylor v. Tyrrell.
>
> . . . .
>
> Now, we don't have to have evidence of any prior earnings or anything like that, but — it could be minimal, but it just seems to me that we have not reached the minimal threshold of impairment of earning capacity.

In *Baylor v. Tyrrell*, 177 Neb. 812, 822, 131 N.W.2d 393, 400

(1964), this court noted that in objecting to the instruction, appellant's counsel asserted that "no loss of past earnings was proved, and none was pleaded." We said, "On the other hand, impairment of earning capacity is an item of general damage and proof may be had under general allegations of injury and damage. [Citations omitted.] Proof of an actual loss of wages or earnings is not essential to a recovery for loss of earning capacity." *Id.* at 823, 131 N.W.2d at 400-01.

We quoted with approval language from a Minnesota case, *Wilson v. Sorge*, 256 Minn. 125, 132, 97 N.W.2d 477, 483 (1959), speaking of impairment of earning capacity as an item of general damage:

> It permits recovery for a loss or diminution of the power to earn in the future and is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. It is within the province of the jury to weigh all these elements and, guided by experience and common sense, to arrive at the proper monetary value of plaintiff's loss without recourse to his past earnings.

See, also, *Washington v. American Community Stores Corp.*, 196 Neb. 624, 244 N.W.2d 286 (1976).

Proof was introduced as to Chadd's age, life expectancy, health, habits, talents, skills, and permanency of certain injuries. As argued persuasively by appellant's counsel, Chadd, who had admittedly limited educational skills before the accident, cannot conceivably have been other than adversely affected by a brain injury and related memory, speech, and loss of hearing problems and, of course, a shortened leg resulting in a pronounced mobility problem. Appellee LT&T does not point out the "minimal threshold of impairment of earning capacity" that Chadd did not meet so as to entitle it to the instruction given. On the contrary, the proof was adequate and the failure to instruct on future earning capacity was error requiring a reversal for retrial on the issue of damages.

As this court cannot state whether the jury found that Chadd was not contributorily negligent or whether it found him to be contributorily negligent but to a degree less than slight when compared to the defendant's gross negligence, the issue of

contributory negligence will necessarily again be submitted to the jury in its determination of damages. The jury must, however, be informed that the negligence of Chadd, if any, is less than slight, and the jury must be instructed to return a money verdict for appellant.

The appellant assigns as error the admission into evidence of a statement of the LT&T driver, Harris, given to Officer Starr at the accident scene. On the plaintiff's case in chief the following questions were asked by counsel:

> Q. Now, Officer, as I understand it, once again, you observed only one skid mark. Now, you had a conversation with the driver of the truck at the scene of the accident, is that correct?
>
> A. Yes, I did.
>
> Q. Now, did he make any observations to you at that time, Officer, about the way the truck handled when he attempted to bring it to a stop?
>
> A. Yes, he did.
>
> Q. And what did he say to you?
>
> A. He felt that the brakes were not working properly.

The statement was admitted as an admission of a party pursuant to Neb. Rev. Stat. § 27-801(4)(b) (Reissue 1985).

Officer Starr was later recalled to the stand by the defendant, and defense counsel was allowed to inquire into the rest of the same conversation. His testimony with regard to the conversation included the following:

> Q. . . . Officer Starr, you testified that you had a conversation with the driver of the pickup truck, Gerald Harris.
>
> A. Yes.
>
> Q. Was that a conversation about fifteen minutes after the accident occurred?
>
> A. It would have been real close to that. I can't say exactly it was fifteen minutes.
>
> Q. Did you have more than one conversation with Gerald Harris?
>
> A. No.
>
> Q. What did Mr. Harris say to you in that conversation?
>
> . . . .

> THE WITNESS: I had questioned Mr. Harris in regard to the accident. Essentially, Mr. Harris stated to me that he was northwestbound on Capitol Parkway in the curb lane, approximately 30 to 35 miles per hour. He stated that when he was four to five car lengths from the intersection of Randolph that he observed that he had a green light for northwestbound traffic. He stated that he continued into the intersection, at which time he heard the passenger in his vehicle yell something to the effect of look out, at which time he stated that directly in front of him he observed a juvenile and that the juvenile was running to the south. He states that he applied his brakes and then the collision occurred.

Appellant contends that Harris' statement about the boy's running to the south was inadmissible as substantive evidence because prior inconsistent statements were admissible only for purposes of impeachment. Appellee contends that the statement was admissible as substantive evidence. Neb. Rev. Stat. § 27-106(1) (Reissue 1985) states:

> When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.

The driver, Harris, testified previously that he was driving through the intersection at 30 to 35 miles per hour and did not see Chadd until his attention was called to Chadd's presence by his passenger. We observe that had the statement been offered for impeachment purposes only it was clearly admissible; the requirement of previous examination of the declarant and declarant's denial no longer pertains in Nebraska law. See *State v. Johnson*, 220 Neb. 392, 370 N.W.2d 136 (1985).

In discussing the completeness doctrine in *State v. Manchester*, 213 Neb. 670, 679, 331 N.W.2d 776, 781 (1983), we stated:

> The defendant's argument is based on the "rule of completeness," which states that an opponent may require one introducing part of a writing or statement to introduce any part which ought in fairness to be considered with the part introduced. See, Fed. R. Civ. P. 32(a)(4), which applies the rule to use of depositions; McCormick on Evidence § 56 (2d ed. 1972); Fed. R. Evid. 106, Notes of Advisory Committee.

Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. McCormick on Evidence § 56 (E. Cleary 3d ed. 1984). When this danger is not present it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to fail to exclude all the evidence.

The rule was stated by the Minnesota Supreme Court, " 'When part of a conversation is brought out on cross-examination the remainder of the conversation may be brought out . . . if it tends to qualify or explain the part disclosed . . . ; *otherwise not*.' " *Jeddeloh v. Hockenhull*, 219 Minn. 541, 551, 18 N.W.2d 582, 588 (1945). The conversation introduced by plaintiff dealt only with whether the truck had faulty brakes. The proffered conversation did not qualify or explain the previous testimony. Whether Chadd was running or not running cannot conceivably be said to embrace the subject of faulty brakes. The admission of the testimony was error.

Since this case must be retried in part, we must comment on another evidentiary ruling. The trial court excluded the deposition evidence of the driver, Harris, on the ground that as a condition of the admission of that evidence the offering party must demonstrate the witness' unavailability. The deposition was clearly admissible under § 27-801(4)(b) as a statement offered against a party in either his individual or a representative capacity. Neb. Ct. R. of Disc. 32 (rev. 1986) refers to witness testimony and not to admissions of a party.

The remaining assignments of error relate to matters which will be unlikely to occur on retrial in view of our evidentiary rulings and do not need to be discussed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

HENRY STEED AND STEED BROTHERS CONSTRUCTION CO., INC., APPELLANTS AND CROSS-APPELLEES, V. OAK RIDGE EQUESTRIAN CENTER, INC., ET AL., APPELLEES AND CROSS-APPELLANTS.

401 N.W.2d 495

Filed February 27, 1987. No. 85-372.

1. **Jury Instructions: Appeal and Error.** In determining the sufficiency of jury instructions on appeal, this court will read the instructions as a whole, and when they fairly submit the case and the jury could not have been misled, there is no prejudicial error.
2. _____: _____. It is not error for the trial court to refuse a requested instruction when it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case.
3. _____: _____. Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. Ordinarily, it is error to submit to the jury an issue which is not pleaded in the case.
4. **Conspiracy: Words and Phrases.** The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another.
5. **Conspiracy: Proof.** It is necessary to prove the existence of at least an implied agreement, to establish a conspiracy.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Brian R. Watkins and Richard Scott of Watkins & Scott, for appellants.

Martin A. Cannon of Matthews & Cannon, P.C., for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

This was an action for damages for an alleged conspiracy by the defendants to ruin the business and profits of the plaintiffs, Henry Steed and Steed Brothers Construction Co., Inc.

Steed Brothers is in the business of wrecking buildings. To operate its business successfully it needs a landfill site where it can dispose of the debris and rubble from the buildings it demolishes.

The defendant Robert C. Luikart formerly operated the Oak Ridge Equestrian Center on a 53-acre irregular tract of land just

north of Omaha, Nebraska. The land was wooded and had several large ravines upon the property. On November 1, 1979, Steed Brothers entered into a lease agreement with Oak Ridge for the use of a portion of the Oak Ridge property as a landfill. In June of 1980 Oak Ridge's attorney advised Steed Brothers to cease dumping on the property. In May of 1981 Oak Ridge commenced an action against Steed Brothers to enjoin the latter from continuing to dump on the property. A temporary restraining order was issued by the court, and dumping on the property was halted.

The matter came on for hearing July 7, 1981. During the hearing the parties entered into a settlement agreement which was dictated into the record, the alleged breach of which is the basis of this case. The settlement agreement required Steed Brothers to remove an earthen "ramp" from the Oak Ridge property within 7 days, at which time the restraining order would be dissolved. Steed Brothers also agreed to seed an arena located on the property. The parties agreed to meet on the property later that day "to stake the property for the removal of the ramp and for the boundaries of the land to be purchased."

With regard to the land to be purchased by Steed Brothers, the agreement provided in part that

> the land will be described in a survey which will be completed within a reasonable time hereafter to allow for the execution of the purchase agreement on or before August 1, 1981.
>
> Under the terms of the purchase agreement the defendant will give the plaintiff a $10,000 down payment and will assume the land contract or mortgage of the plaintiff now existing against this property, and the defendant will make his payment through an escrow agent to ensure that the land contract or mortgage is paid in full.
>
> . . . .
>
> The parties further agree that the survey to be completed of the property will be completed within a reasonable time and the cost of such survey will be split equally between the parties.

A few days after the settlement agreement was reached, the parties met at the property and set the boundaries for the

survey. At that time the parties agreed to wait until fall to have the property surveyed, to avoid additional expenses caused by the dense foliage in the area. Steed Brothers removed the ramp on the property, and the restraining order was dissolved. Steed Brothers then resumed dumping at the site but did not seed the arena.

On August 5, 1981, Steed Brothers' then attorney, William Dittrick, wrote to Oak Ridge's then attorney, Stephen Gerdes, and requested the latter to obtain the proper consents for assumption of the mortgage on the property, requested that the required downpayment of $10,000 be placed in escrow to pay a substantial payment due on the property in 1982, and commented that he assumed the purchase agreement and other necessary agreements were being prepared. Subsequently, in telephone conversations between Oak Ridge's attorneys and Steed Brothers' attorney, which occurred between August 5 and 28, the latter was informed the necessary consents had been obtained and the parties would proceed. On August 28, 1981, Dittrick again wrote to one of Oak Ridge's attorneys, to confirm an earlier telephone conversation. The letter stated that it was Dittrick's understanding that all necessary consents had been obtained and requested the attorney for Oak Ridge, Martin Cannon, to prepare the purchase agreement as soon as possible so that the matter could be finalized and the litigation closed.

The next correspondence which appears in the record is dated October 22, 1981, wherein Steed Brothers was notified the entire tract of land owned by Oak Ridge, including the portion Steed Brothers had agreed to buy, had been sold to Anderson Excavating and Wrecking Co., a competitor of Steed Brothers. The letter was written by Martin Cannon, Oak Ridge's attorney, on behalf of the Anderson Co. In addition to informing Steed Brothers of the sale, the letter stated that Steed Brothers had violated the terms of its lease and the terms of the settlement agreement and, therefore, should find another landfill site. The Anderson Co. offered to allow Steed Brothers to use the site for a "reasonable period" upon proof of insurance and a conference with Cannon to set the terms of the usage. Steed Brothers continued to use the property until June

1982.

On September 15, 1982, Henry Steed and Steed Brothers filed this action, alleging that Oak Ridge and Robert Luikart had conspired with the Anderson Co. and Virgil Anderson, the president of the Anderson Co., to breach the settlement agreement, thereby preventing Steed Brothers from using the landfill, and damaging its business and profits. The plaintiffs alleged the breach of the settlement agreement was

> a direct result of a deliberate conspiracy between the defendants for the purpose of ruining the business and profits of the plaintiff herein and permanently damaged plaintiff's ability to compete by denying the plaintiff the use of the proposed land site that was the subject of the in court settlement.

The plaintiffs sought to recover damages for lost profits and the loss of future business and profits, and special damages of $150,000.

The defendants' answer, substantially, was a general denial.

At the close of all of the evidence the trial court dismissed the case as to Henry Steed and Virgil Anderson. The jury returned a verdict in favor of Oak Ridge, Robert Luikart, and the Anderson Co. This appeal followed.

The defendants assert a cross-appeal, contending that their motion for a directed verdict at the close of the evidence should have been granted. They contend that the plaintiffs failed to establish a prima facie case of conspiracy against Oak Ridge, Luikart, and the Anderson Co., because all of Steed Brothers' rights under the lease and settlement agreement, as well as all of Oak Ridge's defenses, were unchanged by the sale to the Anderson Co.

The testimony at trial was conflicting. Luikart testified that he had negotiated with the Anderson Co. in 1977 or 1978 for the sale of his property, but the negotiations had lapsed until late September or early October of 1981. Luikart admitted he had a "legal obligation" to sell Henry Steed the land by August 1, but when that date had passed and Steed Brothers had not fulfilled its end of the bargain, he felt the agreement was null and void. Luikart then testified that before the sale he called Steed Brothers and offered it the entire tract for the same terms as he

had offered the Anderson Co. After Steed Brothers refused the offer, Luikart sold the property to the Anderson Co. Luikart testified that he negotiated the sale to the Anderson Co. through its then vice president, Don Reynolds. He also testified that while he had agreed to defer the survey of the property, he had not agreed to defer the balance of the agreement, including the downpayment and mortgage payments Steed Brothers had agreed to pay.

Virgil Anderson testified, by way of deposition, that he believed negotiations for the sale of the property began in approximately January of 1981. He testified that Don Reynolds had negotiated the sale on behalf of the Anderson Co. and that he had been made aware of the settlement agreement and understood Steed Brothers had a right to purchase the property by a certain date. He further testified the parties waited until after that date to close the sale. It was his understanding that if Steed Brothers failed to purchase the property by that date, its lease became void.

Henry Steed testified that Luikart had offered him the right to purchase the entire tract on the same terms offered to the Anderson Co. Steed admitted that he had not made the required $10,000 downpayment nor made any mortgage payments as required by the agreement. He stated that he had not made the payments because he had not signed the purchase agreement, yet conceded that Luikart had made some demand for the payments and had not expressly agreed to postpone those payments until the survey was completed and the purchase agreement signed.

There was also testimony from Luikart and Anderson that Steed Brothers had violated the terms of its landfill permit by improperly dumping material for which it had no permit, after the sale to the Anderson Co. Anderson testified it was the improper use of the site which ultimately led to the termination of the use of the landfill by Steed Brothers.

The plaintiffs have made three assignments of error.

The first two assignments of error concern the trial court's refusal to give two instructions offered by the plaintiffs. Plaintiffs first contend the trial court erred in refusing to instruct the jury that the settlement agreement bound the

parties as a matter of law. Plaintiffs next contend the trial court erred in refusing to give the following instruction: "[A]ny Defendant who intentionally or improperly interfered with or conspired to interfere with the in court settlement agreement was liable to the Plaintiffs-Appellants for damages."

In determining the sufficiency of jury instructions on appeal, this court will read the instructions as a whole, and when they fairly submit the case and the jury could not have been misled, there is no prejudicial error. *Kresha v. Kresha*, 216 Neb. 377, 344 N.W.2d 906 (1984); *Duling v. Berryman*, 193 Neb. 409, 227 N.W.2d 584 (1975). It is not error for the trial court to refuse a requested instruction when it has, on its own motion, "fairly and fully instructed the jury on a party's theory of the case." *Kresha, supra* at 380, 344 N.W.2d at 909. See, also, *Baumann v. Hutchinson*, 124 Neb. 188, 245 N.W. 596 (1932).

Plaintiffs contend the trial court was required to instruct the jury that the settlement agreement was binding as a matter of law in view of Neb. Rev. Stat. § 7-107 (Reissue 1983), the defendants' admissions, the defendants' testimony at trial that no material disagreement existed as to the legal description or survey, and the plaintiffs' counsel's testimony that he was never informed prior to the sale to Anderson that any problem existed with regard to the settlement agreement. The plaintiffs argue the trial court misled the jury by instructing it as to the intent of the parties in making the settlement and as to the interpretation of the settlement agreement.

In instruction No. 2 the trial court instructed the jury that the plaintiffs alleged the parties had entered into an in-court settlement agreement to settle a prior lawsuit between them. The instruction stated that Oak Ridge had agreed to sell the property in dispute to the plaintiffs and that the plaintiffs alleged they had fully performed under the agreement, but that Oak Ridge and Luikart had not. The instruction then set out plaintiffs' allegations concerning the defendants' alleged conspiracy to damage the plaintiffs. In instruction No. 3 the court set out the defendants' answer to the petition, including the defendants' admission "that on or about August 28, 1981, no material disagreements then existed between the parties, and the plaintiff was merely waiting for preparation of such papers

to carry out the intent of the parties in the settlement agreement." The instruction further stated, "The defendants further admit that defendant Oak Ridge refused to prepare the purchase agreement, land contract and consents for the sale of the land to effectuate the settlement of the parties, even though the preparation of such documents was their sole responsibility."

In instruction No. 5 the court instructed the jury the plaintiff Steed Brothers had the burden to prove

> [t]hat in 1981, the defendants, or some of them, entered into a conspiracy with the purpose or object of denying the plaintiff the use of the proposed land site that was the subject of the settlement agreement evidenced by Exhibit 1 and thereby to deny the plaintiff its business profits from the use of said site.

Further, in instruction No. 12 the court stated, "The settlement agreement evidence [sic] by Exhibit 1 was reached during hearings in this court to determine whether that temporary restraining order should continue or be dissolved."

The existence or binding nature of the settlement agreement was not an issue at the trial. Instead, the testimony centered on whether the parties had performed as required by the agreement. The instructions, read as a whole, adequately instructed the jury as to the existence of the settlement agreement and its possible construction. Because the record shows the plaintiffs were not prejudiced by the omission of this instruction, plaintiffs' first assignment of error is overruled.

The plaintiffs next contend the trial court erred in failing to instruct the jury that any defendant who tortiously interfered with the plaintiffs' business was liable for any damages caused thereby. Plaintiffs appear to be arguing that the trial court should have given an instruction for an alternative ground of liability; conspiracy to interfere with the plaintiffs' business or tortious interference by any defendant. This contention is also without merit.

The petition alleged only that the breach of the settlement agreement was the result of a conspiracy by the defendants to deny the plaintiffs the use of the land in question. There was no allegation that any one defendant tortiously interfered with any

business right of the plaintiffs. In addition, the record discloses no evidence of tortious interference by any defendant, acting alone.

" 'Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. Ordinarily, it is error to submit to the jury an issue which is not pleaded in the case.' " *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 690, 380 N.W.2d 268, 277 (1986) (quoting *Simon v. Christie*, 210 Neb. 600, 316 N.W.2d 303 (1982)). As this issue was not raised in the pleadings nor supported by the evidence, the trial court properly refused to give the requested instruction to the jury.

Plaintiffs' final assignment of error concerns the trial court's ruling that the deposition statements of Virgil Anderson were not admissible against Oak Ridge and Luikart. The trial court limited the applicability of Virgil Anderson's deposition testimony to the deponent and the Anderson Co. Plaintiffs contend this ruling was erroneous because a prima facie case of conspiracy had been proven at that point, and, therefore, the statements of Anderson were admissible against the other defendants as coconspirators. Plaintiffs contend the elements of a conspiracy were established by the testimony of William Dittrick, plaintiffs' first witness.

"The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another." *Hahn & Hupf Constr. v. Highland Heights Nsg. Home*, 222 Neb. 189, 194, 382 N.W.2d 607, 611 (1986). See, also, *Davidson v. Simmons*, 203 Neb. 804, 280 N.W.2d 645 (1979). It is necessary to prove the existence of at least an implied agreement, to establish a conspiracy. *Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc.*, 531 F.2d 910 (8th Cir. 1976).

Although the trial court submitted the issue to the jury, the evidence as to a conspiracy was weak and circumstantial at best. The defendants conceded that the sale to the Anderson Co. was subject to whatever rights Steed Brothers had in the property, and contended that Steed Brothers lost its rights under the settlement agreement when it failed to perform.

At the close of all of the evidence, the court dismissed

Anderson from the case. The record supports this dismissal because there was no evidence that Anderson, as an individual, conspired to interfere with Steed Brothers' purchase of the landfill site. Anderson was not personally involved in the negotiations for the sale of the property, and there was no evidence that he had instructed or authorized Don Reynolds, as vice president, to conspire with the other defendants to harm the plaintiffs. Anderson was not proven to be a coconspirator, so his statements were not admissible against Luikart and Oak Ridge under the coconspirator rule.

Since the judgment was in favor of the defendants, it is unnecessary to consider the cross-appeal.

The judgment of the district court is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

LLOYD A. RECTOR, APPELLEE, V. SHIRLEY ANN RECTOR, APPELLANT.

401 N.W.2d 167

Filed February 27, 1987. No. 85-474.

Divorce: Domicile: Intent: Jurisdiction. One who proves he or she met the durational residency requirement for jurisdiction in divorce proceedings set out in Neb. Rev. Stat. § 42-349 (Reissue 1984) shall be permitted the inference that such residency was with the intention to make Nebraska a permanent home, absent a showing that the residency was a sham and not bona fide.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

James R. Nisley, for appellant.

Frank E. Piccolo of Murphy, Pederson, Piccolo & Pederson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

Shirley Ann Rector appeals from an order of the district court for Lincoln County dissolving her marriage to Lloyd A. Rector and dividing the property between the parties. She alleges for the first time that the court lacks subject matter jurisdiction, and further contests the district court's award of a truck and trailer to the husband. We affirm the order in all respects.

The appellee is an over-the-road truckdriver who spends the majority of his time operating a truck between the east and west coasts of the United States. Appellee was reared in North Platte, considers it his home, does his banking there, and testified at trial that he has resided there for several years prior to petitioning for divorce. In the district court's order the trial judge made specific findings that the appellee had resided in North Platte for at least 1 year and that it had jurisdiction over the matter.

Neb. Rev. Stat. § 42-349 (Reissue 1984) provides in part:

> No action for dissolution of marriage may be brought unless at least one of the parties has had actual residence in this state with a bona fide intention of making this state his permanent home for at least one year prior to the filing of the petition, or unless the marriage was solemnized in this state and either party has resided in this state from the time of marriage to filing the petition.

The parties were married in Nevada on July 10, 1976. The appellant argues that the appellee failed to prove that he resided with bona fide intent to make Nebraska his permanent home, and, therefore, the district court erred in finding it had jurisdiction of the matter.

In *Ashley v. Ashley*, 191 Neb. 824, 217 N.W.2d 926 (1974), the constitutionality of the durational residency requirement for jurisdiction over divorce proceedings was challenged. In that opinion this court recognized jurisdiction depends on domicile and that the durational residency requirement may well be the least restrictive method of determining domicile, as it is useful in demonstrating bona fide residence. The requirement was upheld as a reasonable method of serving the state's compelling interest in ascertaining the domicile of those who seek dissolution of their marriages in Nebraska's courts.

Mr. Rector's testimony supports the finding that he met the 1-year residency requirement. Since the requirement's constitutional validity is based upon its usefulness in proving that the petitioner had bona fide domicile, we hold that one who proves he or she met the durational residency requirement shall be permitted the inference that such residency was with the intention to make Nebraska a permanent home, absent a showing that the residency was a sham and not bona fide. This holding is consistent with the purpose of the durational residency requirement and recognizes that an intent to be a permanent resident often has few tangible attributes other than duration.

We must review this case de novo on the record and reach conclusions independent of those made by the trial judge. Neb. Rev. Stat. § 25-1925 (Reissue 1985); *Burhoop v. Burhoop*, 221 Neb. 657, 380 N.W.2d 254 (1986). It is our conclusion that the appellee resided in Nebraska for more than 1 year prior to filing his petition, that his residency here was bona fide and not a sham, and that the district court had jurisdiction to act upon the appellee's petition.

The appellant also contests the division of property made by the district court. Division of property is entrusted to the discretion of the trial court and will not be disturbed on appeal absent a showing of abuse of discretion. *Burhoop v. Burhoop, supra*. Our review of the record discloses no abuse of discretion, and therefore we affirm the order in all respects.

AFFIRMED.

CAROL GALE, APPELLANT, V. ALFRED J. GALE, APPELLEE.

401 N.W.2d 501

Filed February 27, 1987. No. 85-531.

1. **Alimony: Appeal and Error.** On appeal an alimony award will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion by the trial judge.
2. _____: _____. The ultimate test in determining correctness in the amount of the alimony awarded is reasonableness as determined by the facts of each case.
3. _____: _____. The factors determining the reasonableness of an award of alimony include the duration of the marriage, history of the contributions to the marriage by each party, the ability of the supported party to engage in gainful employment, and the income and earning capacity of each party, as well as the general equities of each situation.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed as modified.

Frank E. Piccolo of Murphy, Pederson, Piccolo & Pederson, for appellant.

Richard A. Birch of Nielsen & Birch, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

Carol Gale, petitioner, appeals to this court from a decree entered in a dissolution of marriage proceeding by the district court for Lincoln County. A dissolution hearing was held on April 17, 1985, and the court entered a decree dissolving the marriage.

Carol has urged several assignments of error, but only one was discussed in her brief and during oral argument. It has long been the rule that errors assigned but not discussed will generally not be considered by this court on appeal. *Johnson v. Johnson,* 209 Neb. 317, 307 N.W.2d 783 (1981). As such, the only assignment of error we will address is whether the amount of alimony awarded to Carol by the court is inadequate and not supported by the evidence or law. Because we find that the award of alimony is inadequate, we modify the judgment of the district court.

Carol and Alfred J. Gale, the respondent, were married for

35 years at the time of the dissolution action. Carol is 51 years old and has worked at a variety of minimum-wage jobs most of her life, but has not worked outside the home for the past 5 years. She has recently been looking for a job, but has been unable to find one. She has some health problems, but does admit she is capable of holding down a job if she can just find one. She believes she will need approximately $1,229 per month living expenses after the dissolution of her marriage.

Alfred, on the other hand, is 55 years old and has worked at the Union Pacific Railroad for approximately 36 years. He testified he nets approximately $1,800 per month, but his pay stub introduced into evidence indicates he actually nets, after taxes, approximately $2,037 per month. Additionally, his 1984 income tax return discloses that his net after taxes is approximately $2,088 per month. This takes into consideration his railroad retirement tax of approximately $197 per month. Historically, he overpays his taxes, and for 1984 he will receive a refund of approximately $2,400. Alfred believes he will incur approximately $1,500 per month living expenses after the marriage is dissolved. Finally, he testified he intends to retire at 62 and guesses his retirement income would be $1,200 per month.

The court determined that Carol could probably get a job for 40 hours a week at minimum wage, which would provide her with a little less than $500 a month. It also determined that Alfred nets about $1,800 per month, but added $150 more per month to that amount to account for the yearly tax refund, resulting in a total of $1,950 per month. The court then awarded Carol $650 per month in alimony in order for there to be some "equalization" between the parties. Using the court's figures, Carol would have access to $1,150 per month, and Alfred would be left with $1,300 per month. The court then determined that when Alfred is 62 he will retire, and his income will go down to $1,200 per month. Figuring that it will then be impossible for Alfred to pay $650 per month, the court reduced the alimony to $350 per month until Carol reaches the age of 62, when alimony would cease, presumably because at that time she will be entitled to half of Alfred's retirement income.

It is the rule in Nebraska that the awarding of alimony in

marriage dissolution cases is a matter entrusted to the sound discretion of the trial judge. On appeal an alimony award will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. *Busekist v. Busekist, ante* p. 510, 398 N.W.2d 722 (1987); *Taylor v. Taylor,* 222 Neb. 721, 386 N.W.2d 851 (1986). The ultimate test in determining correctness in the amount of alimony awarded is reasonableness as determined by the facts of each case. *Busekist v. Busekist, supra; Taylor v. Taylor, supra.* An appropriate award of alimony must turn on reasonableness and the circumstances of each case in light of the factors set forth in Neb. Rev. Stat. § 42-365 (Reissue 1984). Those factors include duration of the marriage, history of the contributions to the marriage by each party, and the ability of the supported party to engage in gainful employment. In addition to the specific criteria listed in § 42-365, the income and earning capacity of each party, as well as the general equities of each situation, must be considered. *Taylor v. Taylor, supra.*

With the foregoing in mind, we believe that the trial court abused its discretion in setting the amount of alimony. The documentary evidence shows that Alfred was netting approximately $2,250 per month, instead of the $1,950 the court determined. True, there were some other deductions for union dues and credit union payments. Given that Alfred is making more per month than the court determined, we believe that Carol's award should be increased to $750 per month. Although the record substantiates Carol's claim that she may not be able to get a job for a while in North Platte, we do believe that it was reasonable for the court to find that she had the capacity to earn $500 per month at a minimum-wage job. With alimony of $750 per month, she would then have access to $1,250 per month, enough to meet her expected living expenses. Alfred would have monthly income left to meet his expected living expenses.

We also believe it was improper for the court to order adjustments in the alimony at the time respondent reaches age 62 and complete termination of the periodic payments when petitioner attains the age of 62. The basis for this action by the court was because respondent indicated he was planning to

retire, and, supposedly, when the petitioner reaches the age of 62 she is entitled to a vested portion of her husband's retirement pension.

However, both of these events were somewhat speculative. There was nothing definite about the retirement date, nor was there any solid evidence of the amount of any resulting pension. Additionally, although counsel stipulated that petitioner would be entitled to one-half the amount of her husband's pension when she retired, assuming the respondent had also retired, the figure of one-third was mentioned during arguments. More importantly, there was no evidence from the railway retirement board which in any way substantiated these rather vague claims.

We believe the better way to handle this situation is to leave the alimony of $750 per month in force until the further order of the court. In that way the respondent can come into court and prove an actual change of circumstances in the event that he does retire and suffers a reduction of income. In the same manner, he can follow the same procedure at such time as the petitioner's share of the pension becomes fixed and definite. Substantial adjustments undoubtedly should be made upon the happening of those events, but, in the manner outlined, we believe that burden to show these events is now properly placed on the respondent.

We therefore modify the decree to provide for the payment of alimony to the petitioner in the amount of $750 per month until the further order of the trial court, and, as so modified, the judgment of the district court is affirmed. Petitioner is awarded a fee of $750 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

HENRY R. LATEK, APPELLANT, V. K MART CORPORATION, A FOREIGN CORPORATION, ET AL., APPELLEES.

401 N.W.2d 503

Filed February 27, 1987. No. 85-532.

1. **False Imprisonment: Liability.** Merchants cannot claim protection from civil liability in accord with Neb. Rev. Stat. § 29-402.01 (Reissue 1985) where the detention of a suspected shoplifter was unreasonable because it continued after the detainers knew that their suspicions were groundless and that they had made a mistake.
2. **Expert Witnesses: Trial.** Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion, and where the opinion is based on the facts shown not to be true the opinion lacks probative value.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded for further proceedings.

Richard F. Welling and Kelle J. Westland of Breeling, Welling, Place & Steier, for appellant.

Albert M. Engles and Jack A. Dike of Hansen, Engles & Locher, P.C., for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal by the plaintiff below from a jury verdict in favor of appellees, K Mart Corporation and others, on a cause of action for false imprisonment. The jury found for appellant on a separate cause of action for assault and battery and returned a verdict in the amount of $15,000. No appeal was taken by K Mart from that verdict, and the disposition of that cause will not be discussed here.

Two principal errors are assigned. First, the trial court erred in refusing to direct a verdict for appellant on the false imprisonment count, and second, the court erred in sustaining an objection to the testimony of Dr. Jerome Sherman, an economist, concerning appellant's diminished capacity to earn in the future.

A review of the facts is necessary. Henry R. Latek was, on

November 23, 1982, a self-employed builder and carpenter. After completing a remodeling project and collecting from the owner, Latek drove first to a banking outlet and then to a K Mart store at 50th and L Streets in Omaha, Douglas County, Nebraska, arriving at 6:45 p.m. He parked his van near the entrance and went immediately to an area of the store in which cassette tapes were offered for sale. As the tape case was secured, he requested assistance. After ascertaining that the desired tape was not available, he left the store.

The K Mart store has a vestibule consisting of a space, on opposite sides of which are inner and outside doors. As he was leaving through the outer doors he heard one of two men say, "Let's get him," whereupon Latek, fearing an assault and conscious of some $500 in his possession, started to run toward his van. Before reaching the van he was tackled, forced to the parking lot surface on his stomach, his arms forced behind his back, and handcuffed. At the same time his face was held to the surface by means of a baton or club held to the back of his neck.

Latek was lifted to his feet and was informed that the two men were security guards. They escorted Latek through the store, handcuffed, to a second-story office, where he was held for a period of 15 to 20 minutes until he was released, a suspected offender having been apprehended in the meantime. Latek claimed injuries to his neck, arm, and leg as a result of the incident. At the time of the incident Latek was dressed in denim jeans and a denim jacket, wore a full beard and mustache, and had nearly shoulder-length hair. He was about 5 feet 7 inches tall.

Charles Gurzick and Joseph Costello were, at the time of these events, observing customers of K Mart from a window overlooking the selling area. It was to this area that Latek was later removed. Gurzick observed a man approximately 5 feet 7 inches in height. The man had a full beard, mustache, and long hair, and was wearing blue jean trousers, a bright blue vest, and a long-sleeved red shirt. Gurzick observed this male tearing the plastic covering from packs of two batteries each and placing the batteries in his trouser pockets or down the front of the trousers. Gurzick dispatched Costello to the sales floor to observe the suspect. He shortly followed. Gurzick and Costello

did not obtain a clear front view of the suspect, but saw him from the rear, and had a fleeting view of the side and front when he passed from their view.

Gurzick and Costello then adjourned to the outside of K Mart and engaged in a conversation. Costello had forgotten what the suspect looked like, and Gurzick reminded him that the suspect resembled a neighbor of Gurzick's. It was at this point Latek walked out of the store and was pursued and apprehended. Before pursuing Latek, Gurzick informed Costello, "I don't think that's him, Joe." According to Gurzick, Costello replied, "That's him man, that's him." After a further protest by Gurzick, Costello said, "It is damn it."

At all times Latek was protesting his innocence and demanding to be searched. No search was made, and no attention was paid to Latek's protests.

As Latek was being escorted through the vestibule, Gurzick's attention was diverted to the checkout lanes immediately in front of the inner doors: "At this time . . . I glanced over at the check-out lanes; and at this point I noticed Mr. Roberts, who was the actual shoplifter. I noticed him going through the check-out lines." Without informing Costello, who held Latek near the door, Gurzick left to apprehend the actual shoplifter. When asked, "Is there a reason why at that time you did not let Mr. Latek go?" Gurzick responded, "At that point I figured it would have caused a lot more trouble and harm if we would have explained the situation in the midst of the floor . . . and stuff." Gurzick was further asked, "Now, by this time you knew Mr. Latek was not the individual that you initially were after?" to which he responded, "Yes."

The actual shoplifter was apprehended, asked to accompany Gurzick to the office, and did so. He was not handcuffed, though Latek, whom Gurzick now knew to be innocent, was led handcuffed through the store to the office, where he was held an additional 15 to 20 minutes, and finally released from the handcuffs and allowed to leave.

Neb. Rev. Stat. § 29-402.01 (Reissue 1985) states:

> A peace officer, a merchant, or a merchant's employee who has probable cause for believing that goods held for sale by the merchant have been unlawfully taken by a

> person and that he can recover them by taking the person into custody may, for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time. Such taking into custody and detention by a peace officer, merchant, or merchant's employee shall not render such peace officer, merchant, or merchant's employee criminally or civilly liable for slander, libel, false arrest, false imprisonment, or unlawful detention.

Assuming, as we must do for the purposes of this case, that the statements of Gurzick and Costello constituted probable cause for the detention of Latek, we are faced with the acknowledged fact that Gurzick knew that he had apprehended and detained an innocent person. Nevertheless, he did not inform Costello of that fact, and detained Latek for a substantial period of time, handcuffed.

The record establishes clearly that a detention arguably lawfully made was continued for an unreasonable time, i.e., after the detainers knew that their suspicions were groundless and the apprehension a mistake. Such further detention was clearly unreasonable, and the judge was in error in not so holding. See *Hardin v. Barker's of Monroe, Inc.*, 336 So. 2d 1031 (La. App. 1976).

Appellant argues that the trial court's refusal to receive the testimony of Dr. Sherman was erroneous. In *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979), we articulated the rule that expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion, and where the opinion is based on the facts shown not to be true the opinion lacks probative value. Dr. Sherman's opinion on Latek's decreased earning capacity was based on the assumption of a permanent 10-percent disability of the body as a whole. The only medical witness testified the disability was not permanent. The trial court was correct in excluding the testimony.

We reverse and remand for further proceedings in conformity with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROY A. JOHNSON, APPELLANT, V. SHEILA K. JOHNSON, APPELLEE.
401 N.W.2d 506

Filed February 27, 1987. No. 85-947.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Emily R. Scherr of Law Offices of Robert C. Guinan, for appellant.

William G. Line of Kerrigan, Line & Martin, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

In a prior opinion, *Johnson v. Johnson, ante* p. 159, 396 N.W.2d 284 (1986), we summarily affirmed the judgment of the district court because of the failure of the appellant to file a bill of exceptions in this court as required by then Neb. Ct. R. of Prac. 5C(5) (rev. 1986).

Appellant filed a motion for rehearing which is still pending, and consequently the issuance of the mandate has been stayed. In the meantime, we have amended the previously-referred-to rule by placing the responsibility for filing the bill of exceptions in this court on the clerk of the district court rather than on the appellant, provided the appellant has timely filed the bill in the district court.

Because the appellant had made a timely filing of the bill with the clerk of the district court, he is entitled to have us consider the bill of exceptions, in light of our amendment of the rule.

However, from our de novo review of the record, which we are obligated to do, we conclude that the judgment of the district court was correct on the merits, and it is hereby affirmed. Appellee is awarded as costs the sum of $750 for the services of her attorney in this court. The motion for rehearing is overruled.

AFFIRMED.

IN RE ESTATE OF MARY V. WALKER, DECEASED. GRACE M. WALKER, PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES O. WALKER, DECEASED, APPELLANT, V. LAWRENCE WALKER, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY V. WALKER, DECEASED, APPELLEE.

402 N.W.2d 251

Filed March 6, 1987. No. 85-481.

1. **Decedents' Estates: Wills: Intent.** The cardinal rule concerning a decedent's will is the requirement that the intention of the testator or testatrix shall be given effect, unless the maker of the will attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy.
2. _____: _____: _____. To arrive at a testator's or testatrix's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in a will, employ the generally accepted literal and grammatical meaning of words used in the will, and assume that the maker of the will understood words stated in the will.
3. **Wills.** When language in a will is clear and unambiguous, construction of a will is unnecessary and impermissible. As a corollary of this rule, when ambiguity exists in a testamentary provision, construction of a will is necessary.
4. **Wills: Words and Phrases.** Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings.
5. _____: _____. A patent ambiguity is one which exists on the face of an instrument.
6. _____: _____. *Construction* includes the process of determining the correct sense, real meaning, or proper explanation of an ambiguous term, phrase, or provision in a written instrument.
7. **Wills.** When patent ambiguity exists in a will, a court must resolve such ambiguity as a matter of law.
8. **Appeal and Error.** Regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent from the conclusion reached by a court whose judgment is the subject of review.
9. **Wills: Judges.** Neb. Rev. Stat. § 24-519 (Reissue 1985) expressly denies to an associate county judge who is not an attorney at law the power to construe a will.

Appeal from the District Court for Harlan County: BERNARD SPRAGUE, Judge. Affirmed in part, and in part reversed and remanded with direction.

Patrick J. Nelson of Jacobsen, Orr & Nelson, P.C., for appellant.

Denzel R. Busick of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

When Mary V. Walker, 91 years of age, died on May 15, 1984, her survivors included her brother, James O. Walker, and 13 nieces and nephews. Mary's uncontested will, executed in 1977, was admitted to probate in the county court for Harlan County. Among the directions and dispositions contained in Mary's will were:

> IV
>
> In the event that my sister-in-law Alta Walker shall survive me, I devise the sum of $200.00 without restriction or reservation.
>
> V
>
> If my brother, James O. Walmer [sic] shall survive me, I give and devise to my brother a life estate in and to the following described real estate [legal description omitted for the purpose of this opinion], he to have the income therefrom for and during the period of his natural lifetime .... Upon the death of James O. Walker as the life tenant, or upon my death if my brother James O. Walker shall not have survived me [at this point in her will, Mary specified a procedure for sale of her real estate to family members]. If none of the Walker family members above named desire to purchase the land it shall be sold by my Personal Representative in whatever manner he shall deem to be for the best interest of my estate. My Personal Representative, if a Walker family member herein named, shall not be disqualified from buying the land by reason of his fiduciary capacity. The proceeds realized from the sale of the land shall be distributed to the persons and in the manner directed in paragraph VI of this will.
>
> VI
>
> All of the rest, residue and remainder of my estate . . . shall be sold and converted to cash by my Personal Representative .... Whenever my residuary estate has been converted into cash as herein directed the same shall be distributed and I devise said residuary cash estate as

follows:

A. If my brother James O. Walker shall survive me, I give and bequeath one-third thereof to him without restriction or reservation. If my brother James O. Walker shall not have survived me, his share of said cash residuary estate shall lapse and be divided to the beneficiaries named in the following sub-paragraph.

B. I give and bequeath the two-thirds remaining of my cash residuary estate to the following nephews and nieces who are living at the time of my death, namely [here, Mary's will listed 13 nieces and nephews as individual devisees] . . . .

Mary's will then designated her nephew Lawrence Walker as personal representative.

At her death, Mary owned the real estate described in paragraph V of her will. Surviving Mary were James O. Walker, Alta Walker, and the 13 nieces and nephews named as devisees in paragraph VI of Mary's will. One of Mary's nephews, Lawrence Walker, was appointed personal representative and, on October 10, 1984, filed in the county court a "FORMAL PETITION FOR COMPLETE SETTLEMENT AFTER FORMAL TESTATE PROCEEDING," alleging:

5. The will of Mary V. Walker, page two, states that James O. Walker shall have a life estate in the real estate owned by Mary V. Walker and as described on page two. The real estate described on page two constitutes all of the real estate that Mary V. Walker owned at the date of her death. The will further states that the real estate is to be appraised at the time of James O. Walker's death by two disinterested appraisers and their values averaged to determine the sale price thereof. The personal representative shall then offer the same at the value so established to only the following Walker family members: [names of family members] and sell it for cash to the one accepting the same.

On page three of the will, Mary V. Walker's will further states that the proceeds realized from the sale of the land shall be distributed to the persons and in the manner directed in Paragraph VI of the will.

> On page three, Paragraph VI of the will, the will states that whenever the residuary estate has been converted into cash, the same shall be distributed and devised one-third to James Walker, provided he is living at the date of Mary V. Walker's death, and the remaining two-thirds equally to the following nieces and nephews who are living at the time of Mary V. Walker's death, namely [names of 13 nieces and nephews], "the same to be divided equally between the named beneficiaries who were living as of the time of my death."
>
> The personal representative interprets the directions of Mary V. Walker to direct and authorize that after the death of James O. Walker and after the real estate is converted to cash that the proceeds thereof would be divided equally among the nieces and nephews named above, namely [nieces and nephews] in equal shares, so that each of the persons named above would each receive a one-thirteenth share of the net sales proceeds of the real estate sold after James O. Walker's death. All thirteen of the persons so named in Mary V. Walker's will are alive at this time, but in the event one of them should die prior to James O. Walker, it would appear from a reading of the will that Mary V. Walker intended that each survive only beyond her death and there is no requirement that any of them survive James O. Walker, so that in the event one of them should predecease James O. Walker, his or her share shall not lapse but shall go to his or her heirs by the right of representation.

At the conclusion of his petition, the personal representative requested that the court

> D. Enter an order construing the will of Mary V. Walker so that after the death of James O. Walker and the eventual conversion of the real estate to cash, that the net sales proceeds shall be divided, a one-thirteenth share each, to [nieces and nephews], and in the event one of them predeceases James O. Walker, his or her share shall not lapse but shall go to his or her heirs by right of representation.

The "CERTIFICATE OF SERVICE" incorporated into the

petition recites that the personal representative mailed a copy of his petition to each of the 13 nieces and nephews, including himself, but not to James O. Walker. A "notice" was properly published in the appropriate newspaper, namely, notice that the personal representative had filed a petition for complete settlement and that a hearing on such petition would be held on November 1. A copy of that notice, as published on October 11, was mailed to James O. Walker.

On October 31 the personal representative filed a "SCHEDULE OF DISTRIBUTION" reflecting James O. Walker's life estate in Mary's real estate and a one-third interest in Mary's residuary estate. The schedule of distribution also reflected the $200 devise to Alta Walker. Additionally, the personal representative's schedule of distribution recited that each of Mary's 13 nieces and nephews had a "1/13 of 2/3 of Residue" and a "1/13 remainder interest [in Mary's real estate] subject to sale of same upon James Walker's death, all as set forth in Mary Walker's Will."

A hearing on the personal representative's petition was held on November 1. The record does not indicate that any evidence was adduced in reference to the petition and does not identify persons attending that hearing. After considering the personal representative's petition, the associate county judge, who, both parties agree, was not an attorney at law, entered a "FORMAL ORDER FOR COMPLETE SETTLEMENT AFTER FORMAL TESTATE PROCEEDING," which stated:

> D. The Personal Representative be, and hereby is authorized and directed to deliver and distribute title and possession of the assets of the estate to the distributees in the amount and manner set forth in the Schedule of Distribution after payment of 1984 Federal and State Income taxes.
>
> E. The Authority of the Personal Representative shall not terminate, but shall continue until the death of James Walker, at which time, pursuant to the terms of the will, the Personal Representative shall offer the real estate of Mary V. Walker to the Walker family members named in the will of Mary V. Walker and in the manner thereof, and, in the event none of the family members shall purchase

said real estate as set forth in the Mary V. Walker will, the Personal Representative shall sell the same at public or private sale.

After the real estate is sold, the proceeds shall be distributed in equal shares to the following named persons: [names of Mary's 13 nieces and nephews], and if any predecease James Walker, his or her share shall not lapse but shall pass to his or her beneficiaries by the right of representation.

James O. Walker filed his appeal to the district court, contesting the distribution prescribed in the November 1 order entered by the associate county judge. Pending his appeal in the district court, James O. Walker, who was 79 years of age at the time of Mary's death, died, and, without any objection, Grace M. Walker, personal representative of the estate of James O. Walker, deceased, was substituted for prosecution of the appeal from the county court. The district court affirmed the associate county judge's November 1 order of distribution in the estate of Mary V. Walker, deceased.

Grace M. Walker, personal representative of the estate of James O. Walker, contends that the testamentary dispositions by Mary V. Walker's will and the nature of the associate county judge's order of distribution necessarily involved a construction of Mary's will. Such action is beyond the power of an associate county judge who is not an attorney at law, Grace Walker argues, in view of Neb. Rev. Stat. § 24-519 (Reissue 1985), which, in part, provides:

> The county judge . . . may assign to associate county judges who are not attorneys at law . . . the following matters:
>
> . . . .
>
> (8) Any proceedings relating to decedents' estates, noncontestable inheritance tax matters, guardianship or conservatorship, except the construction of wills and trusts, the determination of title to real estate, and authorization of the sale or mortgaging of real estate.

Lawrence Walker, personal representative of the estate of Mary V. Walker, counters: "If Appellant's contention is correct,

then it has the ultimate effect of virtually gutting the statutory provisions of the county court statutes which allow county judges to delegate certain functions to associate county judges." Brief for Appellee at 7-8. Additionally, Lawrence Walker suggests that vitality and validity of the associate county judge's order are preserved by Neb. Rev. Stat. § 24-520 (Reissue 1985):

> All assignments of matters to associate county judges shall be by written order signed by the presiding county judge and filed with the clerk. No order or judgment shall be void or subject to collateral attack solely because it was rendered pursuant to improper assignment to an associate county judge.

In view of the manifest intention of the Legislature expressed in the unequivocal language of § 24-519, a county judge cannot assign to an associate county judge who is not an attorney at law any matter which necessitates "the construction of wills and trusts." We also note that § 24-519 (Cum. Supp. 1986) now refers to "clerk magistrates," rather than "associate county judges who are not attorneys at law," but still denies a clerk magistrate the power to determine matters "relating to the construction of wills and trusts."

The cardinal rule concerning a decedent's will is the requirement that the intention of the testator or testatrix shall be given effect, unless the maker of the will attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy. See, *Overbeck v. Estate of Bock*, 198 Neb. 121, 251 N.W.2d 872 (1977); *Lacy v. Murdock*, 147 Neb. 242, 22 N.W.2d 713 (1946); *In re Estate of Dimmitt*, 141 Neb. 413, 3 N.W.2d 752 (1942). To arrive at a testator's or testatrix's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in a will, employ the generally accepted literal and grammatical meaning of words used in the will, and assume that the maker of the will understood words stated in the will. See, *In re Testamentary Trust of Criss*, 213 Neb. 379, 329 N.W.2d 842 (1983); *Jacobsen v. Farnham*, 155 Neb. 776, 53 N.W.2d 917 (1952); *In re Estate of Dimmitt, supra.*

When language in a will is clear and unambiguous,

construction of a will is unnecessary and impermissible. See, *Lowry v. Murren*, 195 Neb. 42, 236 N.W.2d 627 (1975); *Wall v. Wall*, 157 Neb. 360, 59 N.W.2d 398 (1953). See, also, G. Thompson, The Law of Wills § 210 (3d ed. 1947). As a corollary of the immediately preceding rule, when ambiguity exists in a testamentary provision, construction of a will is necessary. Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings. See, *Denis v. Woodmen Acc. & Life Co.*, 214 Neb. 495, 334 N.W.2d 463 (1983); *American Sec. Servs. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986). A patent ambiguity is one which exists on the face of an instrument. *In re Estate of Corrigan*, 218 Neb. 723, 358 N.W.2d 501 (1984); *Jacobsen v. Farnham, supra. Construction* includes the process of determining the correct sense, real meaning, or proper explanation of an ambiguous term, phrase, or provision in a written instrument. See *Koy v. Schneider*, 110 Tex. 369, 221 S.W. 880 (1920). When patent ambiguity exists in a will, a court must resolve such ambiguity as a matter of law. See *In re Estate of Corrigan, supra*. Cf. *Denis v. Woodmen Acc. & Life Co., supra* (construction of an ambiguous clause in a policy of insurance). Regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent from the conclusion reached by a court whose judgment is the subject of review. See *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

Although the record does not disclose that the county judge authorized the associate county judge's action in the case before us, nevertheless, the fundamental question is whether the associate county judge's order of distribution constituted a construction of Mary V. Walker's will.

There is no question that, pursuant to paragraph V of Mary's will, James Walker received a life estate in Mary's real estate. However, in paragraph V of her will, Mary did not explicitly designate persons entitled to the remainder in her real estate when the life estate would become extinguished by the death of James O. Walker as the life tenant. Rather, as expressed in paragraph V of her will, Mary stated that her real estate which

had been subject to James' life estate must be sold and proceeds "distributed to the persons and in the manner directed in Paragraph VI of this will." In paragraph VI, Mary disposed of her residuary estate by directing that James, if he survived Mary as is the fact, shall receive one-third of the residuary estate. At that point, a number of questions arise. Did Mary, in paragraph V of her will and by reference to a plan of distribution specified in paragraph VI(A), intend to devise to the heirs or devisees of James O. Walker a one-third interest in the proceeds realized when Mary's real estate is sold? On James O. Walker's death and when the real estate is sold, are sale proceeds distributable as directed in paragraph VI(A), namely, "one-third thereof [to James O. Walker] without restriction or reservation," so that a one-third share of the sale proceeds must be distributed to the heirs or devisees of James O. Walker? Implicit in the associate county judge's order is an answer in the negative to each of the foregoing questions. As a result of such answer, James O. Walker and his heirs or devisees are denied a share in the proceeds which will be realized from the sale of Mary's real estate. Although the 13 nieces and nephews have survived Mary, what distribution shall be made of the sale proceeds if one of the 13 nieces or nephews is not living at the death of James O. Walker? Does the share of that niece or nephew lapse and become distributable among the remaining named nieces and nephews living at James' death? Is the share of a named niece or nephew who has predeceased James O. Walker contained in the estate of such deceased niece or nephew? By virtue of the associate county judge's order for distribution, each of the three preceding questions was answered, excluding James O. Walker's heirs or devisees from sharing proceeds which will be realized on the sale of Mary's real estate. The preceding questions, seeking interpretive answers, may not be exhaustive, but do illustrate a point. There is more than one reasonable interpretation or meaning for the provisions in paragraphs V and VI of Mary's will. Mary's testamentary provisions produced contradictory or incompatible results, depending on Mary's intention for distribution of the sale proceeds. Thus, there is patent ambiguity in some provisions found in Mary's will and,

consequently, a need for construction of the will to answer at least two questions: Did James O. Walker receive a life estate, one-third of Mary's residuary estate, and nothing more? Or, did James O. Walker receive a life estate, one-third of Mary's residuary estate, and a property right in the sale of proceeds which will be realized on liquidation of Mary's real estate?

As an analysis of the associate county judge's action, and to paraphrase an apocryphal aphorism, we conclude that if such action looks like a construction and acts as a construction, the action is a construction. Ostensibly, the associate county judge's order is based on the premise that the expressions in paragraphs V and VI of Mary's will demonstrate Mary's intention to exclude James and his heirs or devisees from receiving a distribution of proceeds from the sale of Mary's real estate. That order was entered in response to the personal representative's request for action, "construing the will of Mary V. Walker," consistent with the allegations in the personal representative's petition. In entering his order for distribution of Mary's estate, the associate county judge had to answer at least one of the questions we have suggested, if not answer all the questions previously posed. Answering any question we have posed requires construction of Mary's will. What answer the associate county judge selected as a construction of Mary's will is unimportant for the purpose of this appeal. What is important is the inescapable fact that distribution of Mary's estate depends on Mary's intention ascertained from a construction of her will. Section 24-519 clearly places such construction of a will beyond the power of an associate county judge who is not an attorney at law. While we are reviewing a question concerning the power of an associate county judge who is not an attorney at law, we add that in no wise are we deciding a question concerning the correctness of any construction placed, or to be placed, on any word, phrase, or provision in Mary V. Walker's will. Moreover, none of our suggested questions illustrating that some patent ambiguity exists in the language of the will of Mary V. Walker dictates or indicates a particular construction regarding any language in Mary V. Walker's will. Rather, we determine and hold only that the action taken by the associate county judge constituted a

"construction" of Mary's will, an action expressly excluded from the power otherwise authorized in and conferred by § 24-519.

Further, we do not state, and do not hold, that there is ambiguity regarding every devise prescribed in Mary's will. By virtue of the language which is clear and unambiguous in paragraphs IV, V, and VI, Alta Walker received a $200 devise and James O. Walker received a life estate in Mary's real estate plus one-third of Mary's residuary estate. No construction of Mary's will was necessary regarding those devises just mentioned. Under the circumstances, it became the duty of Lawrence Walker, as personal representative of the estate of Mary V. Walker, deceased, to make expeditious distributions in accordance with Mary's intent expressed in the plain provisions of paragraphs IV, V, and VI in Mary's will. Neb. Rev. Stat. § 30-2465 (Reissue 1985) provides:

> A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the court, but he may invoke the jurisdiction of the court, in proceedings authorized by this code, to resolve questions concerning the estate or its administration.

See *Kenfield v. Dudek*, 135 Neb. 574, 283 N.W. 209 (1939).

Next, as viewed by the personal representative in this case, any irregularity in the associate county judge's order is absolved or neutralized by § 24-520. We take a different view of that statute. The case before us involves a direct appeal from the county court's order and, therefore, is not a collateral attack on such order. In *Vasa v. Vasa*, 163 Neb. 642, 80 N.W.2d 696 (1957), after examining the validity of a district court's order entered at chambers, an action then unauthorized by the Nebraska Constitution, this court stated at 645, 80 N.W.2d at 698: "This situation does not go to a procedural irregularity but to the power of the court and the legality of the order. Any judgment or ruling so entered without authority or jurisdiction is void." Similar to the situation in *Vasa, supra*, the present case does not involve some procedural irregularity, but concerns the

very power of the associate county judge to enter the order questioned in the present case. As already noted, § 24-519 expressly denies an associate county judge the power to construe a will. Therefore, § 24-520 does not preserve the order entered by the associate county judge in the case under review.

With the exception of the devise to Alta Walker, the devise of a life estate to James O. Walker, and the devises pertaining to Mary V. Walker's residuary estate, the distribution ordered by the associate county judge involved a construction of Mary V. Walker's will—an action taken outside the power authorized and conferred in § 24-519. Therefore, we reverse the judgment of the district court insofar as such judgment relates to distribution of proceeds from the sale of real estate owned by Mary V. Walker and remand this matter with direction that the district court shall set aside the county court's order of distribution regarding such proceeds of sale and shall remand this matter to the county court for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

BOSLAUGH, J., dissenting.

If the associate county judge construed the will of the deceased in entering the order of distribution, it was at most erroneous, not "void or subject to collateral attack." Neb. Rev. Stat. § 24-520 (Reissue 1985). If the order was otherwise correct, it was at most error without prejudice.

Upon appeal to the district court, all questions of *law* were determined anew. The order of the district court affirming the order of the county court cured any error there may have been in the order of distribution entered in the county court.

JON DUANE BLACK, APPELLEE AND CROSS-APPELLANT, V. SIOUX CITY FOUNDRY CO., AN IOWA CORPORATION, APPELLANT AND CROSS-APPELLEE.

401 N.W.2d 679

Filed March 6, 1987. No. 86-086.

1. **Judgments: Words and Phrases.** A judgment is the final consideration and determination of a court on matters submitted to it in an action or proceeding.
2. **Workers' Compensation.** There is no procedure under the Nebraska Workers' Compensation Act which authorizes the compensation court to clarify an award on rehearing when more than 10 days have elapsed from the date on which the findings were made in the rehearing.
3. _____. In the absence of specific statutory authority to correct an ambiguity by a procedure other than as described in Neb. Rev. Stat. § 48-180 (Reissue 1984), the compensation court does not have authority to enter an order revising one of its awards.
4. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with direction to dismiss.

Wayne E. Boyd of Smith & Boyd, for appellant.

William Horneber of Horneber Law Offices, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The plaintiff, Jon Duane Black, filed a petition in the Nebraska Workers' Compensation Court. In his petition, Black alleged that he had sustained a compensable injury while in the employment of Sioux City Foundry Co. on August 17, 1983, and prayed for an award of compensation under the provisions of the Nebraska Workers' Compensation Act. After a one-judge hearing, a three-judge panel of the compensation court found in favor of Black and entered an "Award on Rehearing" on March 25, 1985. The award ordered Sioux City Foundry Co. to pay for and on behalf of Black certain medicals, which included a bill from Marian Health Center in the amount of $106,950.36 and the bill of the Veterans' Administration for $5,768. Neither party appealed from the

March 25 award of the compensation court.

Sioux City Foundry Co. contacted Marian Health Center about Black's bill and was informed that Central States Health & Life Co. of Omaha had paid $66,420 on Black's account at the Center. The payment by Central States was made under its disability insurance contract issued to Black. After credit for the payment by Central States, the balance of Black's account at Marian Health Center was approximately $40,000. Sioux City Foundry Co. and Marian Health Center negotiated a compromise of the balance due on Black's bill, and, on April 24, the Center accepted payment of $25,000 from Sioux City Foundry Co. in full satisfaction of Black's account. Sioux City Foundry Co. believed that Central States had a right of subrogation or was entitled to reimbursement due to the insurance company's payment to Marian Health Center. Also, by its check Sioux City Foundry Co. paid the Veterans' Administration $5,768, as directed in the award of the compensation court. However, Black and the Veterans' Administration had negotiated a settlement, so that Black was obligated to pay only $3,850 on his account. The Veterans' Administration endorsed the check for $5,768 from Sioux City Foundry Co. and delivered the check to Black.

By virtue of Neb. Rev. Stat. § 48-188 (Reissue 1984), Black had the March 25 award of the compensation court filed in the district court for Dakota County on June 3, 1985, and then filed a praecipe for execution against Sioux City Foundry Co. to satisfy $96,498 unpaid on the award. Sioux City Foundry, on June 19, issued its check to Black and Central States for $66,420, and also issued checks for the remaining hospital and medical bills, totaling $14,550. Thereafter, Sioux City Foundry Co. learned Central States did not have any subrogation interest or right to reimbursement concerning the insurance company's payment to Marian Health Center. Sioux City Foundry Co. then stopped payment on the $66,420 check to Black and Marian Health Center. Black filed a "partial satisfaction" on July 26, 1985, in the district court, indicating a balance of $81,950 to be satisfied by the execution against Sioux City Foundry Co. The sum of $81,950 included the $66,420 on Black's account at Marian Health Center, as represented by the

check which Sioux City Foundry Co. had stopped, and the $15,530 negotiated by the Center and Sioux City Foundry Co. as the reduction in Black's account.

Sioux City Foundry Co. filed an application in the Workers' Compensation Court on August 1, 1985, and alleged that it had paid all of the compensation due Black under the March 25 award and, further, requested that the compensation court determine the rights of the parties regarding the $66,420 payment to Marian Health Center. Sioux City Foundry asked the compensation court to decide whether Sioux City Foundry Co. must pay the $66,420 directly to Black as "compensation," whether Sioux City Foundry Co. was entitled to the benefit of its negotiated $15,530 reduction in Black's account with Marian Health Center, and whether Black was entitled to any part of the $5,768 payment from the Veterans' Administration, in view of the reduction of the amount accepted by the Veterans' Administration in settlement of Black's account. Black filed a "Resistance" to Sioux City Foundry's application and claimed that Sioux City Foundry Co. had not paid "compensation" of $81,950. Black also claimed he was entitled to the benefit of the reduced amount of Black's account negotiated with the Veterans' Administration. The application was heard by the same three-judge panel that had entered the award on March 25, 1985. The compensation court then entered an order on January 6, 1986, by two of the three-judge panel, one judge dissenting, finding that Sioux City Foundry Co. must pay $66,420 to Black, and also finding that Sioux City Foundry Co. was entitled to the benefit of the $15,530 reduction in the amount due on Black's account at Marian Health Center and that Black was entitled to his negotiated reduction or credit on his account with the Veterans' Administration. The compensation court found that "compensation," as used in Neb. Rev. Stat. § 48-130 (Reissue 1984), refers not only to weekly payments of indemnity but also refers to medical and hospital expenses. The compensation court denied Black an attorney fee for his lawyer.

Both parties have appealed. Sioux City Foundry Co. assigns as error the compensation court's finding that "compensation" refers not only to weekly payments of indemnity but also to

medical and hospital expenses. Sioux City Foundry Co. further claims that the compensation court erred in requiring payment of $66,420 to Black and permitting Black to retain the benefit of his compromise settlement with the Veterans' Administration. In its brief at 35, Sioux City Foundry Co. states:

> Clarification of the award was thus required, and such clarification should not be confused with a reopening of the case to seek modification or additional relief. The Compensation Court's order in response to the application for clarification, from which this appeal is taken, is therefore an appealable post-judgment order, separate from the Award on Rehearing itself.

Black's position is that the order entered by the compensation court on January 6, 1986, is not authorized by law. In the errors assigned by Black in his cross-appeal, Black states that the compensation court erred in the denial of an attorney fee and in the rate of interest to be applied to the amounts which the compensation court ordered to be paid.

Neb. Rev. Stat. § 48-185 (Reissue 1984) in part states:

> The proceedings to obtain a reversal, vacation, or modification of judgments, awards, or final orders made by the Nebraska Workmen's Compensation Court after a rehearing shall be by filing in the office of the clerk of the Nebraska Workmen's Compensation Court within one month after the rendition of such judgment or decree, or the making of such final order, a notice of intention to prosecute such appeal signed by the appellant or his attorney of record.

No appeal was taken from the award entered in the compensation court on March 25, 1985. Thus, the award on rehearing became a final judgment in the absence of an appeal to this court.

Sioux City Foundry's appeal is disposed of by our decision in *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986), which arose out of proceedings to dissolve a marriage. On March 11, 1983, a decree of dissolution was entered, and provided for a division of personal property. Neither party appealed from the decree. When the parties were not able to

resolve their separate claims to many items not specifically included in the decree, the wife filed a motion in which she set out the disputed portion of the decree concerning property distribution and requested that the court interpret its decree of March 11, 1983, even though the decree was, at the time of the wife's request, already final. After a hearing, the court, on April 26, 1985, ordered that various items of property were assigned specifically to either the wife or the husband. In reversing the order assigning specific items of property, we stated in *Neujahr v. Neujahr, supra* at 725-26, 728, 393 N.W.2d at 49-51:

> We regret that we must once again reverse and dismiss the proceedings. We do so because there simply is no procedure authorizing what was done in the current action.
>
> . . . "Litigation must be put to an end, and it is the function of a final judgment to do just that. A judgment is the final consideration and determination of a court on matters submitted to it in an action or proceeding." [Citing and quoting from *Crofts v. Crofts*, 21 Utah 2d 332, 445 P.2d 701 (1968).]
>
> . . . .
>
> . . . By whatever name, however, the procedure is one to modify a decree because the decree fails to address the issue [citation omitted].
>
> . . . .
>
> There are, obviously, instances when a decree is ambiguous and parties are left at their peril to know what they are authorized to do. When that situation arises, the parties must bring some form of action which raises the issue and thereby requires the court before whom the matter is then pending to resolve the issue as a matter of law in light of the evidence and the meaning of the decree as it appears.
>
> What the district court did in the instant case was simply to enter a modified supplemental decree, without authority, after the decree had already become final. For that reason the order of the district court entered on April 26, 1985, must be set aside and the cause remanded with

directions to dismiss.

As was the case in *Neujahr v. Neujahr, supra*, there is simply no procedure authorizing what was done in the current action. Neb. Rev. Stat. § 48-180 (Reissue 1984) provides: "The Nebraska Workmen's Compensation Court may, on its own motion, modify or change its findings, order, award or judgment at any time before appeal and within ten days from the date of such findings, order, award or judgment for the purpose of correcting any ambiguity or clerical error." We find no procedure under the Nebraska Workers' Compensation Act which authorizes the compensation court to clarify an award on rehearing when more than 10 days have elapsed from the date on which the findings were made in the rehearing. The application of Sioux City Foundry Co. was clearly filed more than 10 days after the findings for the award on rehearing entered on March 25, 1985. In the absence of specific statutory authority to correct an ambiguity by a procedure other than as described in § 48-180, the compensation court does not have authority to enter an order revising one of its awards. The fact that the parties, without objection, participated in the hearing which led up to the order on January 6, 1986, does not alter the result. As we held in *Riedy v. Riedy*, 222 Neb. 310, 312, 383 N.W.2d 742, 744 (1986): "It is axiomatic, however, that the parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent."

The order of January 6, 1986, entered by the compensation court was not within its jurisdiction and, thus, must be set aside. For this reason, we reverse the judgment of the compensation court and remand this matter to the compensation court with direction to dismiss the application of Sioux City Foundry Co.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

BOSLAUGH and SHANAHAN, JJ., concur in the result.

STATE OF NEBRASKA, APPELLEE, V. ROBERT L. HOFFMAN, APPELLANT.

401 N.W.2d 683

Filed March 6, 1987. No. 86-089.

1. **Constitutional Law: Criminal Law.** Once a defendant has been informed of the rights required by *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), there is no requirement that the same information be conveyed to a defendant on each subsequent court appearance.
2. **Pleas.** After the entry of a plea of nolo contendere but before sentencing, a court should allow the defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution would not be substantially prejudiced by its reliance upon the plea.
3. _____. The burden is upon the defendant to establish by clear and convincing evidence the grounds for withdrawing a plea.
4. **Pleas: Appeal and Error.** The right to withdraw a plea previously entered is not absolute, and in the absence of a clear abuse of discretion exercised by the trial court, the denial of withdrawal will not be disturbed on appeal.
5. **Right to Counsel.** The right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed as modified.

Donald A. Fitch, for appellant.

Robert L. Hoffman, pro se.

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Two charges had been filed against Robert L. Hoffman. The first charge was possession of burglar's tools in violation of Neb. Rev. Stat. § 28-508(1)(a) (Reissue 1985), which is a Class IV felony punishable by a maximum sentence of 5 years' imprisonment, a $10,000 fine, or both such fine and imprisonment, with no minimum penalty. Neb. Rev. Stat. § 28-105(1) (Reissue 1985). In a companion case, Hoffman was charged with criminal attempt (burglary) in violation of Neb.

Rev. Stat. § 28-201 (Reissue 1985), which, in this case, was a Class IV felony. The information charging Hoffman with possession of burglar's tools also contained an allegation for the habitual criminal penalty provided in Neb. Rev. Stat. § 29-2221(1) (Reissue 1985).

On September 3, 1985, Hoffman was arraigned in the district court and appeared with his court-appointed attorney. At arraignment, the two informations were read to Hoffman, including the provision regarding the habitual criminal penalty. The court then explained the penalty regarding possession of burglar's tools and attempted burglary and also explained the enhanced penalty concerning the habitual criminal provision. The district court informed the defendant concerning all rights required by *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). When the court asked if Hoffman understood the charges and the penalties, Hoffman answered, "Yeah." Hoffman entered his plea of "not guilty" to each information. The court then set Hoffman's cases for trial.

On November 13, 1985, Hoffman and his attorney again appeared in the district court, this time to change his plea as the result of a plea bargain reached with the State. By the plea bargain, the State dismissed the charge of attempted burglary and dismissed the habitual criminal provision in the information charging Hoffman with possession of burglar's tools. When the district court asked if the plea bargain was as represented by the county attorney to the court, Hoffman answered, "Yeah." The court elicited and found that there was a factual basis for Hoffman's plea of no contest. Also, Hoffman verified that he had been advised of his "constitutional rights" at the time of arraignment, when he entered a plea of not guilty. Hoffman was informed by the court that his plea of no contest was, in effect, a plea of guilty for the purpose of the charge against Hoffman and that only sentencing remained. Hoffman said he understood that fact. Hoffman informed the court that he had sufficient time to confer with his attorney regarding the plea bargain and was ready to enter a "no contest" plea as required by the plea bargain. The court then determined that Hoffman's plea was being entered voluntarily, intelligently, and understandingly and, therefore, accepted Hoffman's plea of no

contest to the charge of possession of burglar's tools. The court deferred sentencing until a presentence report was submitted.

On December 17, 1985, Hoffman appeared before the district court for sentencing, again represented by his court-appointed counsel. The district court asked Hoffman and his court-appointed counsel if they were prepared to proceed, and the following occurred:

> [Hoffman]: I'm going to object right now. I'm withdrawing my plea and I want this guy to dismiss as counsel.
>
> [Hoffman's counsel]: Your Honor, I have been advised this morning by Mr. Hoffman that he wanted to withdraw his plea. I have indicated I would bring that to the attention of the Court. I have been advised approximately 30 seconds ago to dismiss as his counsel. I have an obligation to the Court to continue to represent him and I will do so. I believe you have the right to inquire of him as to both of his desires here and I would ask that you do that for purposes of the record.

When the court asked why Hoffman no longer wanted his court-appointed attorney, Hoffman answered: "Because he and the sheriff and the deputy get away with all of that shit that's going on downstairs. I laid downstairs with these handcuffs and shackles on all dam night and all dam day, and I haven't done any dam thing. I ain't done nothing."

Then, when the court asked specifically about anything which Hoffman's attorney had failed to do, or about legal representation in the proceedings, Hoffman said: "It's been inadequate. That's what." The court then asked: "In what regard, sir?" Hoffman answered: "He ain't did a lot of the stuff, man." The court found there was no good and sufficient reason shown by Hoffman for discharge of Hoffman's court-appointed counsel. The court then inquired of Hoffman regarding the basis for his requested withdrawal of his plea; Hoffman answered: "Because I feel I've been coerced into the mother . . . by the sheriff, the sheriff's deputy and my attorney, and this county attorney, deputy county attorney too." When the court asked, "Is there anything further as far as your request to withdraw your plea is concerned?" Hoffman

answered, "Nope." The court then refused to allow Hoffman to withdraw the plea of no contest. After reviewing the presentence report with Hoffman and his attorney, the court sentenced Hoffman to imprisonment for a term of 16 to 48 months and did not give Hoffman credit for the time incarcerated before sentencing, which amounted to 190 days. Substitute counsel was appointed for the purpose of Hoffman's appeal to this court.

In his appeal, Hoffman claims that the district court failed to inform him of his constitutional rights and the effect of his plea of no contest, that the court erred in its finding that Hoffman's plea was made knowingly, intelligently, and voluntarily, that the court erred in refusing to dismiss the court-appointed attorney and permit withdrawal of Hoffman's plea of no contest, and that the court erred in failing to give him credit for the 190 days' jail time served in the Dakota County jail.

Upon our review of the record, we find that, as a result of Hoffman's appearances in the district court on September 3 and November 13, 1985, Hoffman was informed of all the rights to be explained by the admonition required in *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). In *State v. Tharp, ante* p. 126, 129-30, 395 N.W.2d 762, 765 (1986), we stated: "[O]nce a defendant has been informed of his right to counsel, there is no requirement that the same information be conveyed to a defendant on each subsequent court appearance." The same rule applies to all the admonitions required to be given a defendant under *State v. Irish, supra*. The record clearly establishes that, when the appearances of Hoffman before the district court on September 3 and November 13 are considered together, all the rights required under *Irish* were stated to Hoffman. Also, the record establishes that Hoffman's plea of no contest was knowingly, understandingly, and voluntarily entered. Therefore, there is no merit to Hoffman's claims that he was not informed about his rights, required by *State v. Irish, supra*, and that the district court erred in finding that Hoffman's plea was made knowingly, intelligently, and voluntarily.

In *State v. Nearhood*, 223 Neb. 768, 393 N.W.2d 530 (1986), this court examined a defendant's alleged claim of mistreatment

in relation to a defendant's request to withdraw a plea of guilty before sentence was imposed. In *Nearhood*, we stated:

> Nearhood's claims of mistreatment center around the facts that without any due process hearing, he was kept in a segregated cell at the Hitchcock County jail for 14 days prior to entering his plea, during which time he was unable to roam the jail as were the other prisoners; he was not permitted to have visitors; he was not permitted to find a personal physician and be seen by him; his medication was administered by other inmates; and his outgoing mail was censored or perhaps not delivered as promised. The sheriff testified, however, that Nearhood was kept apart from the other prisoners for security reasons.
>
> Whether Nearhood was properly segregated from the other prisoners and whether his privileges were properly curtailed are not material to the inquiry before us. See *O'Rourke v. State*, 166 Neb. 866, 90 N.W.2d 820 (1958). The material question is whether Nearhood has established any "fair and just" reason which would require, absent substantial prejudice to the State, that he be permitted to withdraw his plea.

223 Neb. at 770, 393 N.W.2d at 532.

As further stated in *State v. Nearhood, supra*, "[A]fter the entry of a plea of nolo contendere but before sentencing, a court should allow the defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution would not be substantially prejudiced by its reliance upon the plea." 223 Neb. at 769-70, 393 N.W.2d at 532. See, also, *State v. Copple*, 218 Neb. 837, 359 N.W.2d 782 (1984). "The burden is upon the defendant to establish by clear and convincing evidence the grounds for withdrawing a plea." *State v. Nearhood, supra* at 771, 393 N.W.2d at 533. " 'The right to withdraw a plea previously entered is not absolute, and in the absence of a clear abuse of discretion exercised by the trial judge, [the denial of withdrawal] will not be disturbed on appeal.' " *State v. Dixon*, 223 Neb. 316, 321, 389 N.W.2d 307, 310 (1986). We find no abuse of discretion in the district court's refusal to allow Hoffman to withdraw his plea. There is no merit to Hoffman's claim that the district court erred in

refusing to allow withdrawal of Hoffman's plea of no contest.

" '[T]he right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. . . .' " *State v. Clark*, 216 Neb. 49, 57-58, 342 N.W.2d 366, 371 (1983) (quoting from *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982)). Based on the record presented to this court, we find no error in the district court's refusal to discharge Hoffman's attorney in the trial court.

However, as conceded by the State, there is merit to Hoffman's claim that the district court committed error in failing to credit Hoffman's sentence with the 190 days Hoffman was incarcerated pending trial and sentencing in Dakota County. If the 190-day jail time is added to the minimum sentence imposed in this case, it would be equivalent to a 22-month, 10-day minimum term. According to Neb. Rev. Stat. § 83-1,105 (Reissue 1981), the minimum term imposed can be no greater than one-third the maximum term provided by law. In this case, that would mean the minimum term imposed could not exceed 20 months (one-third of 5 years).

As we have stated in *State v. Knight*, 220 Neb. 666, 667-68, 371 N.W.2d 317, 319 (1985):

> [T]he court's discretion in withholding credit for jail time cannot be used to impose sentences in violation of Neb. Rev. Stat. § 83-1,105(1) (Reissue 1981) [which] requires that in imposing an indeterminate sentence "the minimum limit fixed by the court shall not be . . . more than one-third of the maximum term. . . ."

Therefore, the minimum term of Hoffman's sentence must be reduced by 70 days. Therefore, we modify the judgment of the district court to the effect that 70 days are deducted from the minimum term of imprisonment imposed on Hoffman.

AFFIRMED AS MODIFIED.

TAMARA J. GAUGHAN AND JEFFREY UBER, APPELLEES, V. TOMMY GILLIAM AND SAMIE GILLIAM, APPELLANTS.

401 N.W.2d 687

Filed March 6, 1987. No. 86-205.

1. **Child Custody: Habeas Corpus: Appeal and Error.** A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court.
2. **Parental Rights: Adoption: Proof.** The burden is on a natural parent challenging the validity of a relinquishment to prove that it was not voluntarily given.
3. **Parental Rights: Adoption.** In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid.
4. _____: _____. The mere fact that a mother of a child might be influenced by the real concern expressed by friends or family for the welfare of both the mother and the child does not necessarily mean that a relinquishment executed by such mother is the product of threats, coercion, fraud, or duress.
5. **Child Custody: Habeas Corpus.** A question present in every habeas corpus case for custody of a child is the welfare and best interests of the child.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded with directions.

Craig D. Wittstruck of Berry, Anderson, Creager & Wittstruck, for appellants.

Maureen A. Doerner, for appellee Gaughan.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

This was an action for a writ of habeas corpus brought by Tamara Gaughan and Jeffrey Uber to regain custody of their minor child. The child had been placed for adoption with the respondents, Tommy and Samie Gilliam, pursuant to relinquishments and consents executed by the petitioners. The trial court found against Jeffrey Uber because his consent was voluntary and he did not execute a revocation within a reasonable time. He has not filed a brief in this appeal. However, the court did hold that Tamara Gaughan had not executed the consent voluntarily and did act within a reasonable

time to revoke it. Therefore, the court ordered the child delivered to the custody of the petitioner, Tamara Gaughan, but directed that the order be stayed pending appeal. Respondents have appealed the court's decision.

The assignments of error are that the trial court erred in finding (1) that the relinquishment and consent was executed involuntarily, (2) that the petitioner acted within a reasonable time to revoke her consent, and (3) that the child is being unlawfully detained by the respondents.

On May 4, 1985, Tamara Gaughan, an unmarried 16-year-old living with her parents in Wichita, Kansas, gave birth to the minor child involved in this case. When the child was approximately 5 weeks old, the child, Tamara, and Jeffrey Uber, the child's father, moved to Bellevue, Nebraska, to live with Edward and Pauline Uber, the child's paternal grandparents. They lived there until approximately July 31, 1985, at which time Tamara and Jeffrey moved to their own home. The child was left with Edward and Pauline. This arrangement was a trial adoption to see if Edward and Pauline were willing to adopt the child and for Tamara and Jeffrey to see what it would be like without their child.

Shortly before August 13, 1985, Edward and Pauline decided not to adopt and informed Tamara and Jeffrey of this. Pauline Uber then contacted a friend who knew of a couple, Tommy and Samie Gilliam, who were interested in adopting. Pauline arranged a meeting at her home on or about August 13, 1985, so that Samie could meet the child.

Tamara testified that after this meeting she was very upset, so much so that she ran outside into a storm. She called her mother and told her she did not want to go through with the adoption. She also told Jeffrey that she did not want to go through with the adoption. When Pauline's friend, Girta Rogge, came upstairs to talk to Tamara, she told Tamara that a girl her age needed to go school and to proms. Tamara also testified that whenever Edward and Pauline would talk to her about adoption they kept saying that the baby needed good clothes and that he needed toys and school. They never said that he was lacking in love or attention, or asked Tamara how she felt or what she needed. Tamara, however, never told Pauline or Girta

that she did not want to go through with the adoption.

On August 22, 1985, Tamara was at Edward and Pauline's home. She was getting ready to pick Jeffrey up from work when she was told by Pauline Uber that after they picked Jeffrey up they would go to a lawyer's office regarding the adoption. Tamara testified that nothing was said to her about this meeting until right before they went to it and that she would not have gone to the lawyer's office if it had not been for Pauline. Pauline testified that Tamara knew there was going to be an appointment but did not know the exact date.

The lawyer involved, Douglas Veith, testified that he telephoned Tamara on August 21, 1985, to get the information he needed to prepare the relinquishment and consent forms. When he told her who he was, she said that she wanted to talk to her mother. Douglas Veith said he encouraged her to talk to her mother and that he was not pressuring her at all. He said the conversation was left that he would prepare the documents and that when they made their decision to adopt, they would come into his office.

Tamara denied ever receiving such a telephone call. Veith testified that he made a similar telephone call to Jeffrey, which Jeffrey acknowledged receiving.

Douglas Veith testified that when Tamara, Jeffrey, and Pauline arrived at his office on August 22, 1985, he showed them into his personal office, introduced himself, and explained that he was the attorney for Tommy and Samie Gilliam and that he did not get into people changing their minds concerning parental rights. He then advised them that execution of the consent forms would terminate all parental rights, that they would have no right to come back and reclaim the child, that they could no longer come back and find out about the child, and that the decision was serious and to be made solely by the child's natural parents.

Tamara, on the other hand, testified that she was never advised there were alternatives to adoption such as foster care, that the relinquishment forms were never explained to her, and that she did not understand she would never see her child again. Jeffrey also testified that Veith did not go into detail explaining anything about the relinquishment and adoption process.

Veith then testified that after he told them about the process he gave the documents to Tamara and Jeffrey and advised them to read them and to talk about the process while he left the room for a few minutes. When he returned to his office with a witness, Van Schroeder, Jeffrey had already signed the forms. Schroeder refused to witness the signature, so Veith had the forms reaccomplished. Then, both Jeffrey and Tamara signed the forms in the presence of Veith and Schroeder.

Contrary to Veith's testimony, Tamara and Jeffrey testified that Schroeder did not see Jeffrey sign the relinquishment and consent forms. It was uncontroverted that Schroeder did see Tamara sign her forms and that Tamara only partially signed her name and then stopped signing. When Pauline Uber put her hand on Tamara's shoulder and told her it was best for the child, Tamara finished her signature. Tamara testified that she felt pressured into making a decision.

That evening Pauline took the baby to Girta Rogge's home and the Gilliams received the baby.

"A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court." *Auman v. Toomey*, 220 Neb. 70, 73, 368 N.W.2d 459, 461 (1985).

"The burden is on a natural parent challenging the validity of a relinquishment to prove that it was not voluntarily given." *Id.*

"In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid." *Id.*

In this case, Tamara Gaughan signed the relinquishment and consent form on August 22, 1985. Sometime shortly after that, she and Jeffrey had a fight, after which it was decided that she should get away from him for a while. She went back home to Wichita for approximately 2 weeks and then apparently returned to Bellevue.

At the end of September, Tamara's mother came up from Wichita to Bellevue to see how her daughter was doing. While she was visiting Tamara, Mrs. Gaughan went to visit an attorney, Mr. Hovey, because she was concerned about whether

Tamara should be in school. She also talked to him about whether a minor can validly relinquish the rights to her own child, to which he responded affirmatively.

The following week, on October 9, 1985, Tamara for the first time went in to see Hovey. He told her his hourly rate and half-hourly rate, which she knew she could not afford. She saved her money and then went back to Hovey sometime in November. At that time he said he needed a retainer, the names and present address of the prospective adoptive parents, and the relinquishment papers.

Tamara contacted the attorney who handled the adoption for a copy of the relinquishment documents and was refused. Tamara then went back to Hovey, and he suggested that she contact Legal Aid, which she did. Tamara signed a revocation of relinquishment and consent to adoption form on December 13, 1985. A copy of this document was sent to the attorney handling the adoption. In an attempt to learn the Gilliams' names, Tamara contacted their church pastor, but he would not tell her their names. Finally, on December 30, 1985, she did learn their names. This action for a writ of habeas corpus was filed on January 2, 1986.

The very nature of the act of a mother in relinquishing her child for adoption is emotionally traumatic. However, the mere fact that a mother in a situation such as this might be influenced by the real concern expressed by friends or family for the welfare of both the mother and the child does not mean that such act of relinquishment is the product of threats, coercion, fraud, or duress. We do not think that the record in this case supports such a finding. From our review of the record de novo, we determine that the relinquishment and consent was voluntarily executed by the petitioner, and she has failed to meet her burden of proof to establish the contrary. That she may have changed her mind at some time after she had relinquished the child is insufficient to invalidate the earlier consent. *Auman v. Toomey, supra*. Having determined that the relinquishment was voluntary, it is not necessary for us to consider the question of the timeliness of its attempted revocation.

The remaining question present in every habeas corpus case is the welfare and best interests of the child. *Auman v. Toomey,*

supra. The record is crystal clear that the best interests of the child would be served by allowing the child to remain with the respondents. The testimony of the respondents and of Gene Welch, a psychotherapist who visited the home of the respondents and observed the interactions between them and the child, leaves no basis to conclude that the respondents are unfit to have custody of the child. To the contrary, to uproot this child after approximately a year and a half in his present environment could be seen as nothing but detrimental to his future development. The statement by the trial judge as he announced his oral findings would support such a conclusion.

The judgment of the district court is reversed and remanded with directions to enter judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., dissenting.

For reasons more fully set out in my dissent in *Lum v. Mattley*, 208 Neb. 789, 305 N.W.2d 878 (1981), and my dissent in *Auman v. Toomey*, 220 Neb. 70, 368 N.W.2d 459 (1985), I must likewise dissent in this case.

The hazard which I feared for in *Lum v. Mattley, supra*, did in fact occur in some part in the instant case. The first couple to whom the child was given declined to adopt the child. Had there not been a second couple already in the wings, our decision would stand for the proposition that while the natural mother has lost her rights to the child, the child has acquired no adoptive parents and now becomes a ward of the state. In the case of a licensed agency we would not permit such a situation to arise. See *Kellie v. Lutheran Family & Social Service*, 208 Neb. 767, 305 N.W.2d 874 (1981). One may argue that the distinction between the licensed agency and the private placement is the language of the statute. Nevertheless, in *Kellie v. Lutheran Family & Social Service, supra* at 772, 305 N.W.2d at 877, we said, "Basic principles of offer and acceptance, as well as the statute, dictate that result." I believe that basic principles of offer and acceptance, of mutuality, and of the law regarding contracts, generally, should apply in the case of private placement as well as that of licensed agencies.

In the instant case a near disaster was avoided only because another couple was available. For a host of reasons, that may

not always be the case; yet the rule of law will prevail. I would have supported the action of the district court and affirmed its judgment.

IN RE INTEREST OF R.J., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. R.J., APPELLANT.
401 N.W.2d 691

Filed March 6, 1987. No. 86-548.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed.

David T. Schroeder, for appellant.

Vincent Valentino, York County Attorney, and Charles W. Campbell, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

The county court for York County, sitting as a juvenile court, adjudged the appellant, a male juvenile of the age of 15 years, to be a juvenile within the meaning of Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 1986), i.e., a juvenile under the age of 16 years who has committed a misdemeanor or infraction under the laws of this state in that he had violated Neb. Rev. Stat. § 28-709 (Reissue 1985) by contributing to the delinquency of a child. This determination was affirmed by the district court for York County.

On appeal to this court, error is assigned because of the failure of the courts below to find § 28-709 unconstitutionally vague and overbroad and in their failing to find that the evidence was insufficient to find a violation of § 28-709.

Section 28-709 provides in pertinent part as follows:

> (1) Any person who, by any act, encourages, causes, or contributes to the delinquency or need for special

> supervision of a child under eighteen years of age, so that such child becomes, or will tend to become, a delinquent child, or a child in need of special supervision, commits contributing to the delinquency of a child.
>
> . . . .
>
> (b) A child in need of special supervision shall mean any child under the age of eighteen years . . . who deports himself so as to injure or endanger seriously the morals or health of himself or others.
>
> (3) Contributing to the delinquency of a child is a Class I misdemeanor.

The child in this case was a 14-year-old female. The act which it was alleged contributed to her delinquency occurred on September 20, 1985. According to her testimony, she, the juvenile, and a 19-year-old male friend of the juvenile were together at that friend's apartment. She stated that the two males undressed her, removed their own clothes, and then each, alternately, commencing with the juvenile, engaged in two acts of sexual intercourse with her.

This testimony was substantiated by that of the 19-year-old friend, except that he described only one act of intercourse by each, the juvenile and himself. However, he did testify to circumstances suggesting that in his apartment on an earlier occasion the juvenile had engaged in some type of sexual activity with the child and that later in the evening the juvenile told him, "You ought to try her sometime." Although not referring to this specific occasion, the child testified that she had engaged in sexual intercourse with the juvenile on 8 or 10 previous occasions.

The minor child also testified that she had willingly engaged in sexual activity with the juvenile, that as a result of these activities coming to light she had been "grounded" by her family and was now going to counseling, and that she had not been sexually active with anyone before these occasions.

Norman Cobb, a police officer of the city of York, testified that the two witnesses had given him the same information approximately 1 week after the September 20 incidents when he took the minor child and the 19-year-old friend into custody at the latter's apartment.

Appellant's challenge to the constitutionality of § 28-709 is nearly identical to that made and rejected in *State v. Cialkowski*, 193 Neb. 372, 227 N.W.2d 406 (1975), and *State v. Simants*, 182 Neb. 491, 155 N.W.2d 788 (1968). The legislation is constitutional, and the first assignment of error is without merit.

In his brief appellant correctly states that in order to sustain the judgments of the lower courts it is necessary that he be shown to have by his actions encouraged, caused, or contributed to the minor's deporting herself so as to injure or endanger seriously her principles or habits with respect to right or wrong conduct.

In addition to the testimony of the child that she had been "grounded" and was in counseling, her stepfather told how he and his wife previously had found evidence of the child's untruthfulness, and also recently, particularly with respect to her whereabouts on the night of the sexual episodes previously referred to and to two other occasions when she apparently stayed overnight with the juvenile's friend. He also testified that the child had indicated to him that she was lonely and that the juvenile knew this, and the juvenile's sexual relations with her "has not helped one bit."

Common sense, as well as the sense of decency, propriety, and the morality which most people entertain, to say nothing of the health threat which promiscuous sexual activity promotes, when joined with the obvious consequences which have befallen this child of immature years, amply demonstrates that the actions of the juvenile have contributed to a situation in which the child affected has suffered serious injuries to her principles and habits regarding right or wrong conduct. Cf. *State v. Cialkowski, supra.*

The judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF JAMES M. REDPATH, DECEASED. MARY ALICE PETERSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF ALICE REDPATH, DECEASED, APPELLANT AND CROSS-APPELLEE, V. BESSIE ANN REDPATH, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES M. REDPATH, DECEASED, APPELLEE AND CROSS-APPELLANT.

402 N.W.2d 648

Filed March 13, 1987. No. 85-321.

1. **Trusts: Evidence: Proof.** One who claims the existence of a constructive trust has the burden of proof to establish the existence of a constructive trust by evidence which is clear, satisfactory, and convincing in character.
2. **Trusts: Property: Conversion: Proof.** As a general rule, provided the property can be traced or identified, any third person who has obtained trust property or its product by a transfer made in violation of the trust may be subject to a constructive trust. It is necessary, however, that the property can be traced or identified.
3. **Trusts: Joint Accounts: Conversion.** If the trustee makes a withdrawal from the mixed account for an admittedly personal purpose, for example, to pay his living expenses or his individual debts, or for an unknown purpose, such withdrawal will be charged to the personal part of the account as long as there remains any cash or credit in such personal portion of the account. It will be only after the personal credit or cash is exhausted that withdrawals for personal or unknown purposes will be charged to the trust side of the account.
4. **Trusts: Conversion: Presumptions.** When a trustee wrongfully commingles trust money with his own and makes payments from the common fund, it will be presumed that he paid out his own money, and not the trust money.
5. **Judgments: Ratification: Debtors and Creditors.** In order that a confession of judgment may be binding on the plaintiff, it is essential that he, either expressly or impliedly, assent thereto; if it is made without his request, knowledge, or consent, and entered at the instance of the debtor alone, it will have no validity unless the creditor ratifies or accepts it.
6. **Joint Accounts: Intent.** A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Affirmed as modified.

Brad Roth of Black, Sennett & Roth, for appellant.

Steven O. Stumpff, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

In January of 1982 Alice Redpath, by and through her guardian, her daughter, Mary Alice Peterson, filed a claim against the estate of her son, James M. Redpath, seeking to recover the sum of $54,581.77, which Alice Redpath maintained her son had unlawfully converted while handling moneys belonging to her. After the action was commenced, Alice Redpath died and the cause of action was revived in the name of Mary Alice Peterson, as the personal representative of the estate of Alice Redpath. Following a trial, the district court for Custer County, Nebraska, entered a decree finding in part for the estate of Alice Redpath and in part for the estate of James M. Redpath and his widow, Bessie Ann Redpath. The district court determined that the estate of James M. Redpath had confessed judgment in open court at the beginning of the trial for $348, that apparently being the amount of the premiums paid on a life insurance policy issued on the life of James M. Redpath. The court further determined that the evidence presented was sufficient to establish that James M. Redpath had in fact converted $45,119.15 from his mother and that a claim against his estate for that amount should be allowed. And, although the district court found that the estate of James M. Redpath had confessed judgment in the amount of $348, the district court further found that the appellant had failed to produce sufficient evidence to establish that the proceeds converted from Alice Redpath were used for the payment of any insurance premiums and that, therefore, the appellant had failed to establish that the insurance proceeds constituted a res upon which a constructive trust could be imposed.

It is this judgment and decree from which the personal representative of the estate of Alice Redpath has now appealed to this court. The appellee, Bessie Ann Redpath, both individually and as personal representative of the estate of James M. Redpath, has cross-appealed. We believe that the trial court was generally correct except with regard to its findings concerning the confession of judgment, and for that reason we affirm as modified.

A number of questions are presented to the court by both the

appeal and the cross-appeal. Included is the question as to whether, if a person wrongfully obtains money of another and uses it in the payment of premiums for insurance on his life, a trust may be created in favor of the person from whom the property was wrongfully, illegally, or fraudulently appropriated, over such portion of the total insurance proceeds payable as the amount of the premiums which have been paid from the money wrongfully, illegally, or fraudulently appropriated bears to the total premium paid. While that question was earlier raised in *Mullikin v. Pedersen*, 161 Neb. 22, 71 N.W.2d 485 (1955), like our decision in *Mullikin v. Pedersen*, it is not necessary for us to decide the issue in the instant case. We do not reach that question because the facts in this case fail to disclose that James M. Redpath, during his lifetime, used any of the converted funds for the payment of the premiums on the insurance policy in question.

In beginning our analysis of this matter, we note that one who claims the existence of a constructive trust has the burden of proof to establish the existence of a constructive trust by evidence which is clear, satisfactory, and convincing in character. See, *Ford v. Jordan*, 220 Neb. 492, 370 N.W.2d 714 (1985); *Fleury v. Chrisman*, 200 Neb. 584, 264 N.W.2d 839 (1978); *Marco v. Marco*, 196 Neb. 313, 242 N.W.2d 867 (1976). Furthermore, as observed by the appellant, "As a general rule, provided the property *can be traced or identified*, any third person who has obtained trust property or its product, by a transfer made in violation of the trust" may be subject to a constructive trust. (Emphasis supplied.) 90 C.J.S. *Trusts* § 441 at 850 (1955). It is necessary, however, that the property can be traced or identified.

The record in this case discloses that six premiums were paid on a Bankers Life insurance policy issued on the life of James M. Redpath and payable to his widow, Bessie Ann Redpath. The first of these premiums was paid in December of 1980, and the five remaining premiums were paid at some date thereafter. The record discloses that the premiums were paid out of a First National Bank of O'Neill, Nebraska, account or a Nebraska State Bank & Trust Co. of Broken Bow, Nebraska, account. Both accounts were jointly owned by James M. and Bessie Ann

Redpath. While the record, at best, is confusing, it would appear that the amount of the premiums paid was $348 and that during all of this time there were proceeds clearly belonging to either James M. Redpath or Bessie Ann Redpath in an amount substantially in excess of $348 in either or both of those accounts. Furthermore, the evidence would seem to disclose that, although prior to December of 1980, when the first premium was paid out of the O'Neill account, funds belonging to Alice Redpath were deposited in one or both of the Nebraska accounts, more than $15,000 was transferred from the account in O'Neill, Nebraska, to an account in Tennessee in the joint names of James M. Redpath, Alice Redpath, and Bessie Ann Redpath. Based on the evidence before us, it would appear that by the time that the first premium was paid in Nebraska, most of the moneys belonging to Alice Redpath which had been deposited in either of these Nebraska accounts had been transferred back to an account in Tennessee and that no part of the funds converted from the Tennessee account was ever used to pay the premiums on the policy of insurance issued by Bankers Life on James M. Redpath's life.

In G. Bogert & G. Bogert, The Law of Trusts and Trustees § 926 at 407-08 (2d ed. 1982), the noted authors observe:

> If [the trustee] makes a withdrawal from the mixed account for an admittedly personal purpose, for example, to pay his living expenses or his individual debts, or for an unknown purpose, such withdrawal will be charged to the personal part of the account as long as there remains any cash or credit in such personal portion of the account. It will be only after the personal credit or cash is exhausted that withdrawals for personal or unknown purposes will be charged to the trust side of the account.

And, in *State v. Bank of Commerce*, 54 Neb. 725, 728, 75 N.W. 28, 29 (1898), we said: "[W]hen a trustee wrongfully commingles trust money with his own and makes payments from the common fund, it will be presumed that he paid out his own money, and not the trust money . . . ."

In the instant case, not only did the evidence before us establish that James and Bessie Redpath had more than enough money in the Nebraska accounts to pay the entire premiums,

but that an amount in excess of the amount of money belonging to Alice Redpath and previously deposited in these Nebraska accounts was transferred to Tennessee before the premiums on the policy in question were paid. The evidence failed to establish clearly, satisfactorily, and convincingly that any portion of Alice Redpath's money was used to pay the premiums in question. The district court therefore correctly determined that the appellant has failed to meet her burden of proof to establish by evidence which is clear, satisfactory, and convincing in character that a constructive trust upon the proceeds of the life insurance policy should be impressed by reason of the alleged claim that moneys belonging to Alice Redpath were used to pay the premiums on the life insurance policy.

We believe that part of the confusion in this case arises by reason of the district court's having concluded that judgment should be entered against the estate of James M. Redpath for the amount of the premiums ($348) by reason of a confession of judgment. An examination of the record discloses that, while an effort was made by the appellee to confess judgment in the amount of $348, the offer was not accepted and therefore may not be considered by the trial court or this court in the determination of this case.

Neb. Rev. Stat. § 25-906 (Reissue 1985) provides as follows:

> After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action. Whereupon, if the plaintiff, being present, refuses to accept such confession of judgment in full of his demands against the defendant in the action, or, having had such notice that the offer would be made, of its amount and of the time of making it, as the court shall deem reasonable, fail to attend, and on the trial do [sic] not recover more than was so offered to be confessed, such plaintiff shall pay all the costs of the defendant incurred after the offer. *The offer shall not be deemed to be an admission of the cause of action or amount to which the plaintiff is entitled, nor be given in evidence upon the trial.*

(Emphasis supplied.)

Appellant argues that while she did not accept the offer of confession in so many words, neither did she reject it, and therefore it should be considered to have been accepted. As noted in 49 C.J.S. *Judgments* § 148 at 275 (1947):

> In order that a confession of judgment may be binding on the plaintiff, it is essential that he, either expressly or impliedly, assent thereto; if it is made without his request, knowledge, or consent, and entered at the instance of the debtor alone, it will have no validity unless the creditor ratifies or accepts it. . . .
>
> . . . The creditor's consent to, or acceptance of, the judgment, if not express, may be implied from the circumstances of his dealing with it, as from the fact that he attempts to enforce it. In the absence of anything appearing to the contrary, the creditor's consent may be presumed from the record or from the fact that the judgment confessed operates to his benefit, but the creditor's mere silence or failure to object on being informed of the judgment does not amount to an acceptance of it, although it is admissible as evidence tending to prove his acceptance.

An examination of the record in this case clearly establishes that appellant did not accept or consent to the confession of judgment in the amount of $348 and, quite to the contrary, elected to litigate the question of whether Alice Redpath was entitled to receive all of the proceeds of the insurance policy. As we have already indicated, the evidence before us establishes that premiums were not paid from moneys belonging to Alice Redpath. The offer to confess judgment could only have been made in an effort to resolve the entire lawsuit for $348. The offer did not permit the appellant to both accept a judgment in the amount of $348 and litigate the further question of whether all of the proceeds of the policy were due and owing. In that regard, the district court was in error in entering judgment in favor of the estate of Alice Redpath and against the estate of James M. Redpath. To that extent the judgment of the district court must be modified in favor of the appellee, Bessie Ann Redpath, both individually and as personal representative of the estate of James M. Redpath, and against the estate of Alice

Redpath.

The remaining issue raised by appellee's cross-appeal appears to question the district court's entering a judgment against the estate of James M. Redpath in the amount of $45,119.15, the amount which the district court found had been converted by James M. Redpath from his mother. Appellee does not deny that funds were taken out of the Tennessee joint account and used solely for the benefit of James M. Redpath or his family. Her principal argument in this regard seems to be based upon the notion that when moneys are placed into a joint banking account, they become the property of the joint tenants and may be withdrawn by either party without liability to the other. In support of that position appellee cites to us several cases, including *White v. Ogier*, 175 Neb. 883, 125 N.W.2d 68 (1963), *Rose v. Hooper*, 175 Neb. 645, 122 N.W.2d 753 (1963), and *Crowell v. Milligan*, 157 Neb. 127, 59 N.W.2d 346 (1953). The difficulty with appellee's position is that she ignores the provisions of the Nebraska Probate Code enacted in this jurisdiction in 1974.

Neb. Rev. Stat. § 30-2703(a) (Reissue 1985) provides as follows: "A joint account belongs, *during the lifetime* of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." (Emphasis supplied.) All of the funds which were converted, as found by the district court, were so converted prior to the death of either Alice Redpath or James M. Redpath and therefore clearly fall within the provisions of § 30-2703. The comment to § 30-2703 further provides: "This section reflects the assumption that a person who deposits funds in a multiple-party account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, he usually intends no present change of beneficial ownership." The comment then goes on to provide that this presumption, however, may be rebutted by evidence which is clear and convincing. Not only is the evidence in this case not clear and convincing that Alice Redpath intended to make a gift to her son, but it is actually clear and convincing that she never intended to do so. The evidence in this case clearly establishes that Alice Redpath was

not aware that moneys belonging to her and transferred to joint certificates of deposit would not remain her sole property or that the money had been used by her son for anything else except her care. The most that appellee argues is that the actual intent of Alice Redpath is not known. Appellee argues: "We stress the fact that Alice Redpath's actual intent in placing the accounts in joint ownership is not known." Brief for Cross-Appellant at 8. Accepting that as all of the evidence, we would be compelled to find that the party having the burden of overcoming the presumption created by § 30-2703, in this case appellee, failed and that the decision of the district court was correct.

Appellee further cites to us our decision in *Ford v. Jordan*, 220 Neb. 492, 370 N.W.2d 714 (1985). The *Ford* case has no application because it involved the disposition of joint tenancy property following the death of one of the joint tenants and is controlled by Neb. Rev. Stat. § 30-2704 (Reissue 1985) and not § 30-2703.

Section 30-2704(a) reverses the presumption following death, providing in part as follows: "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created." See, also, *In re Estate of Lienemann*, 222 Neb. 169, 382 N.W.2d 595 (1986). In the instant case, James M. Redpath preceded his mother in death and had converted the funds in question prior to his death.

We believe that the judgment of the district court finding that the estate of James M. Redpath, deceased, is indebted to the estate of Alice Redpath in the amount of $45,119.15 was correct and should be affirmed. The judgment of the district court is therefore affirmed except as herein modified.

AFFIRMED AS MODIFIED.

NANDAGASEN G. NAIDOO, ALSO KNOWN AS CASEY NAIDOO, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE.

402 N.W.2d 653

Filed March 13, 1987. No. 85-515.

1. **Summary Judgment.** On a motion for summary judgment, the moving party is entitled to judgment as a matter of law where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom.
2. _____. In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving that party the benefit of all favorable inferences which may reasonably be drawn from the evidence.
3. _____. The party moving for summary judgment bears the burden of showing that no genuine issue of material fact exists and must produce enough evidence to demonstrate his entitlement to judgment if the evidence remains uncontroverted. If he is successful in doing so, the burden of producing contrary evidence shifts to the nonmoving party.
4. **Employer and Employee: Liability: Negligence.** An action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982), may be based on the theory of respondeat superior or on a theory of direct negligence.
5. **Employer and Employee: Damages.** Only damages for physical injury may be recovered under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982).

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Joseph P. Inserra and John P. Inserra of Inserra Law Offices, for appellant.

Gayla L. Fletcher, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

The plaintiff, Nandagasen G. Naidoo, also known as Casey Naidoo, commenced this action under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 et seq. (1982), to recover general damages for emotional distress and special damages for medical expenses and lost wages alleged to have been caused by the negligence of the defendant, Union Pacific Railroad Company.

The plaintiff alleged his damages were the result of verbal and physical abuse inflicted by a Mr. Bachman, an employee of the defendant, at a June 24, 1981, meeting. The plaintiff claims he was acting in the course and scope of his own employment with the defendant at the time of the meeting.

The defendant's negligence was predicated on two grounds in the petition: In failing to comply with the statutory and nondelegable duties to (1) provide plaintiff with a safe place to work in that it knew or should have known the defendant's employee would or had a propensity to commit the acts alleged; and to (2) provide safe customs and practices to do the work in that defendant failed through its customs and practices to screen the type of individual, namely defendant's employee, who committed the acts alleged.

The defendant's answer generally denied the allegations of the petition and alleged that the FELA was not applicable to the plaintiff's claims.

The defendant filed a motion for summary judgment which was heard on the pleadings, affidavits, and the deposition of the plaintiff. The trial court sustained the motion and dismissed the action. The plaintiff has appealed.

The record shows that in May of 1981, the plaintiff was a specialist in the defendant's billing and contracts department. His direct supervisor, Pam Mellegaard, and her supervisor, Bob Eperson, attempted to fire the plaintiff because of a "personality conflict" between the plaintiff and Mellegaard. The plaintiff, through his union, the Brotherhood of Railway and Airline Clerks (BRAC), attempted to exercise his seniority to find a new job. As a member of BRAC, the plaintiff was subject to the terms and conditions of employment imposed by the collective bargaining agreement between BRAC and the defendant.

A union official, George MacIntosh, informed the plaintiff that he could not be fired. MacIntosh then arranged a meeting between the plaintiff; himself; and two management representatives, John Casteel, an assistant to John Deasey, the controller of the railroad, and Chuck Saylor, an assistant to Casteel. At this meeting the plaintiff was told that he was not fired and was asked to provide a list of deficiencies in the

department and also a writeup on Mellegaard's outside business affiliations. The list of deficiencies was to be given to Deasey. The plaintiff did submit a list of deficiencies to Saylor and a writeup on Mellegaard to MacIntosh.

On June 24, 1981, Bachman, the local chairman of the union and also an employee of the defendant, summoned the plaintiff from his office at work to a meeting with Saylor, MacIntosh, and himself. According to the plaintiff, the following transpired at the meeting:

> A. I went in the office, and there was Mr. Saylor sitting across from me, and Mr. MacIntosh was sitting on the other side of the table. And Mr. Bachman threw this list at me and said, "What is this?" And he used a couple of foul languages.
>
> Q. What did he say?
>
> A. He said, "You think I'm a fucking idiot?" And he threw this — and I said, "What do you mean?" He said — he made a statement, he said, "This is not enough. This is not enough, the list." And he picked on my background and my religion and he threatened — he first — he caught me by my collar up here and pushed me against the wall and said he'd burn my house down, and he told me that he was doing [sic] to kick me out of the country. And I said, "Well, I'm a citizen," and he said, "Well, not anymore." He said, "Then you're fired. Get out of here." And Mr. Casteel's staff was all outside, they all heard it, so —

According to the plaintiff, Bachman was intoxicated at the time of the incident.

Saylor later apologized to the plaintiff for Bachman's actions and assured the plaintiff that Bachman could not fire him. Bachman was employed in a different department, and there is no evidence that the plaintiff ever worked for or with Bachman.

As a result of the confrontation with Bachman, the plaintiff claims he began to drink, take drugs, gamble, and have marital problems, which eventually led to his divorce. The plaintiff also claims that he suffered nightmares, fear, anger, paranoia, and sleeping problems, lost his management aspirations, and even began to plot to kill the people at work whom he believed had caused his problems. The plaintiff claims that he was truly

fearful of Bachman's threats because he believed Bachman to be a dangerous man.

The plaintiff claims that the order granting the motion for summary judgment was in error because the trial court impliedly and erroneously determined that (1) Naidoo's claim was a minor dispute under the Railway Labor Act (RLA), 45 U.S.C. §§ 151 et seq. (1982), and, therefore, was within the exclusive jurisdiction of the National Railroad Adjustment Board, (2) Bachman was not, in fact, acting within the scope of his employment with Union Pacific at the time he allegedly assaulted Naidoo, and (3) as a matter of law, a purely mental injury is not cognizable under the FELA.

We note at the outset that on a motion for summary judgment, the moving party is entitled to judgment as a matter of law where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom. *Deutsche Credit Corp. v. Hi-Bo Farms, Inc., ante* p. 463, 398 N.W.2d 693 (1987). In considering such a motion, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. *Deutsche Credit Corp., supra.* The moving party bears the burden of showing that no genuine issue of material fact exists and must produce enough evidence to demonstrate his entitlement to judgment if the evidence remains uncontroverted. *Deutsche Credit Corp., supra.* If he is successful in doing so, the burden of producing contrary evidence shifts to the nonmoving party. *Deutsche Credit Corp., supra.*

The plaintiff contends there was a genuine issue of material fact as to whether Bachman was acting within the scope of his employment with the defendant at the June 24, 1981, meeting.

The FELA makes the carrier liable for "the negligence of any of the officers, agents, or employees of such carrier . . . ." 45 U.S.C. § 51. Although the express language of the statute limits the carrier's liability to that for the negligence of its employees, etc., the FELA has been interpreted to reach at least some intentional torts. *Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807 (7th Cir. 1985).

Two theories of liability are recognized in FELA cases involving intentional assaults by fellow employees. *Brooks v. Washington Terminal Co.*, 593 F.2d 1285 (D.C. Cir. 1979). The first, the respondeat superior theory, provides that an assault committed by an employee in the course of his duties and in furtherance of the employer's business can serve as a basis for FELA liability. *Jamison v. Encarnacion*, 281 U.S. 635, 50 S. Ct. 440, 74 L. Ed. 1082 (1930); *Lancaster v. Norfolk and Western Ry. Co., supra; Brooks v. Washington Terminal Co., supra; Sowards v. Chesapeake & O. Ry. Co.*, 580 F.2d 713 (4th Cir. 1978); *Green v. River Terminal Ry. Co.*, 585 F. Supp. 1019 (N.D. Ohio 1984), *aff'd* 763 F.2d 805 (6th Cir. 1985). The second, the direct negligence theory, holds the railroad employer liable for failing to prevent reasonably foreseeable danger to an employee from intentional or criminal misconduct. *Harrison v. Missouri Pacific R. Co.*, 372 U.S. 248, 83 S. Ct. 690, 9 L. Ed. 2d 711 (1963); *Lancaster v. Norfolk and Western Ry. Co., supra; Brooks v. Washington Terminal Co., supra; Sowards v. Chesapeake & O. Ry. Co., supra; Green v. River Terminal Ry. Co., supra.*

The traditional concept of proximate cause is abrogated in FELA cases by the fact that the plaintiff's proof is sufficient to state a claim if it shows that the carrier's negligence, however slight, played some part in causing the injury. *Green v. River Terminal Ry. Co., supra.*

In the present case, the record shows Bachman was acting solely in his capacity as a union representative at the June 24, 1981, meeting.

The RLA imposes an affirmative duty on both the carrier and the employee

> to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier . . . .

45 U.S.C. § 152.

The evidence is clear that the plaintiff initiated contact with the local BRAC office in May of 1981, after he claims his

immediate supervisors allegedly attempted to fire him. This initial contact led to the two meetings between union officials and management representatives. Those meetings reflect reasonable efforts by the parties to settle the dispute in compliance with the RLA.

In his deposition the plaintiff admitted that Bachman and his assistant, MacIntosh, were both union representatives and did not work in the same department as the plaintiff. Bachman's only purpose in attending the June 24, 1981, meeting was in his capacity as a union official.

Under the direct negligence theory of FELA liability, the plaintiff need not prove that the coemployee's misconduct was done in furtherance of the employer's business. See, *Harrison v. Missouri Pacific R. Co., supra; Lancaster v. Norfolk and Western Ry. Co., supra.*

The plaintiff argues that since there is some evidence that at least one official of the defendant was aware of Bachman's propensity for making and carrying through on threats, it is reasonable to infer that the defendant could have foreseen harm to other employees by its continued employment of Bachman or by its failure to supervise his activities. See *Harrison v. Missouri Pacific R. Co., supra.* The difficulty with this argument is that the selection of union officials is a matter controlled entirely by members of the union. The affidavit of D.D. Matter, assistant director of labor relations for the defendant, establishes that the selection of union representatives for the BRAC is made exclusively by members of the union, and the defendant is forbidden by federal law to interfere in or control the selection of union representatives by the union members. Thus, anything done by the local chairman of the union in his capacity as chairman was a union matter which was in no way subject to the control of the defendant. The record establishes that there was no genuine issue of material fact as to liability upon a direct negligence theory.

The plaintiff in this case admits that he sustained no physical injuries as a result of the incident on June 24, 1981, and claims only damages resulting from emotional distress. The clear weight of authority is that only damages for *physical* injury may be recovered under the FELA.

In *Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807, 813 (7th Cir. 1985), the court recognized that "the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact—an act such as telling a man he's fired . . . ."

Previously, in *Bullard v. Central Vermont Ry.*, 565 F.2d 193 (1st Cir. 1977), the court recognized that recovery for mental distress in an FELA action is allowed only to the extent that it is directly associated with physical injuries resulting from the defendant's negligence. Several recent federal district court decisions adhere to this view. In *Moody v. Maine Cent. R. Co.*, 620 F. Supp. 1472 (D. Me. 1985), the court granted the defendant's motion for summary judgment against the plaintiff's FELA claim for emotional distress, which was alleged to be the result of harassment and psychological abuse by the employer. Relying on *Bullard, supra*, the court concluded that "there can be no recovery for emotional disturbance under the FELA without some *precipitating* physical injury." (Emphasis in original.) *Moody, supra* at 1473.

In *Finn v. Consolidated Rail Corp.*, 622 F. Supp. 41 (D. Mass. 1985), *aff'd* 782 F.2d 13 (1st Cir. 1986), the court granted the defendant's motion for summary judgment where the employee's estate brought an FELA action. The estate claimed that the employee became depressed and ultimately committed suicide as the result of a recordkeeping error which resulted in the employee's not being hired by a third party which had taken over part of the original employer's route. Relying on *Bullard, supra*, the court sustained the motion because there was no showing of a precipitating physical injury.

In *McSorley v. Consolidated Rail Corp.*, 581 F. Supp. 642 (S.D.N.Y. 1984), the court held that allegations of false arrest and malicious prosecution did not state claims under the FELA. This holding was based in part on the court's recognition of the fact that the FELA was judicially expanded to encompass intentional conduct that caused physical injury "in order to effectuate the Act's central purpose of removing legal obstacles to the compensation of employees who are physically injured or killed at work." *McSorley, supra* at 645. See, also, *Brady v. Penn Central Transp. Co.*, 406 F. Supp. 1239

(S.D.N.Y. 1975).

Also, in the very recent case of *Pikop v. Burlington Northern R. Co.*, 390 N.W.2d 743, 753 (Minn. 1986), the court decided that a state tort action for intentional infliction of emotional distress was not preempted by the FELA because "recovery for intentional acts under the FELA is limited to intentional torts that cause *physical* injury."

The overwhelming majority of courts have recognized that the purpose of the FELA is to provide a means of compensation to railroad employees who are physically injured as a result of their employment. See, e.g., *Brady v. Penn Central Transp. Co., supra*. The trial court did not err in holding that the plaintiff had failed to state a claim under the FELA.

It is unnecessary to consider the contentions of the parties in regard to the jurisdiction of the National Railroad Adjustment Board.

The judgment of the district court is affirmed.

AFFIRMED.

FIRST NATIONAL BANK, STROMSBURG, NEBRASKA, A CORPORATION, APPELLEE, V. BENEDICT CONSOLIDATED INDUSTRIES, INC., AND RONALD L. BAKER, APPELLANTS, ROBERT W. BAKER AND WILLIAM E. REETZ, APPELLEES.

402 N.W.2d 259

Filed March 13, 1987. No. 85-713.

1. **Guaranty: Time.** A guarantor is not discharged by an extension of time for payment or performance of the principal obligation if he consents thereto, as where the contract of guaranty expressly or impliedly provides for the extension.
2. **Pleadings: Proof.** The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so they cannot recover upon mere argument alone.
3. **Guaranty.** With an unconditional guaranty of payment, the holder is not required to first seek collection or satisfaction against the maker, but is authorized to go directly against the guarantors.
4. **Banks and Banking: Debtors and Creditors.** A bank may set off the funds of a depositor to pay a debt due the bank from the depositor, and, absent an

agreement to the contrary or specific instructions from the debtor, a creditor may apply the proceeds to such debts and in such order as the creditor determines.

Appeal from the District Court for Polk County: WILLIAM H. NORTON, Judge. Affirmed.

Richard F. Welling and Alan M. Thelen of Breeling, Welling, Place & Steier, for appellants.

Ward F. Hoppe of Mattson, Ricketts, Davies, Stewart & Calkins, for appellee First National Bank.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ.

KRIVOSHA, C.J.

The First National Bank, Stromsburg, Nebraska (First National), filed suit against Benedict Consolidated Industries, Inc. (BCI), and Robert W. Baker, Ronald L. Baker, and William E. Reetz, as guarantors of a certain note executed and delivered by BCI to First National in the principal sum of $70,894.03. The note provided on its face that it was initially due on February 13, 1982. The note further provided on its face, "Sureties, endorsers and guarantors consent that time of payment of this note or any part thereof may be extended from *time to time without notice*." (Emphasis supplied.) The reverse side of the note signed by the guarantors reads as follows:

> For value received the endorsers of this note hereby guarantee the validity thereof, the genuineness of the signatures thereto and *the payment thereof* at maturity or at any time thereafter, waiving demand, notice on non-payment, protest *and all defenses by reason of extending the time of payment* or delay in bringing suit.

(Emphasis supplied.)

Following a trial to the court, a jury having been waived, judgment was entered in favor of First National and against all of the defendants in the sum of $93,839.15 plus accruing interest. It is from this judgment that BCI and Ronald Baker appeal to this court. Jointly, they allege that the district court erred in rendering judgment for one or more of the following reasons. (1) The guarantors, including Ronald Baker, were

discharged from liability because the time of payment on the note was improperly extended. (2) The original debt was extinguished by agreement of the parties. (3) First National failed to take sufficient steps to collect the debt from BCI before pursuing the guarantors. (4) The district court failed to properly set off certain sums on deposit with First National against the principal debt involved in this action. We have reviewed the record and have concluded that the judgment of the trial court is in all respects correct and should be affirmed.

The appellants' first assignment of error is based upon their argument that the time of payment of the note was extended to April 21, 1982, more than 31 days beyond the original maturity date of the note. Indeed, there is language on the reverse side of the note which reads, "Extend to 4-21-82 Robert W. Baker." Appellants then cite to us the provisions of Neb. U.C.C. § 3-606(1) (Reissue 1980), which reads in part as follows: "The holder discharges any party to the instrument to the extent that without such party's consent the holder (a) without express reservation of rights . . . agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person . . . ." Appellants then argue that since there was an extension of the time of payment, it must be shown that the extension was within the authority granted by statute or the endorser is discharged. Subject to certain exceptions, Neb. U.C.C. § 3-118(f) (Reissue 1980) limits the time payment may be extended. Section 3-118(f) provides in part: "Unless otherwise specified consent to extension authorizes a single extension for not longer than the original period." Appellants then maintain that in view of the fact that this extension was from February 13, 1982, until April 21, 1982, and was longer than the original period, i.e., 31 days, the extension was unauthorized and, therefore, the individual guarantors are discharged. The difficulty with their argument is that, while they correctly cite the law, they ignore the facts. Both §§ 3-606(1) and 3-118(f) provide, in effect, that the statutes as written apply unless there is an agreement by the parties to the contrary. In the instant case the document, on its face, reflects an agreement to the contrary. To begin with, the face of the note provided that the note could be extended "from time to time

without notice." It seems clear that this constitutes express consent to extend time of payment for more than 31 days. But more important than all of that is the language of the guaranty itself, found on the reverse side of the note. By signing the note as guarantor, Ronald Baker specifically agreed to waive "all defenses by reason of extending the time of payment." It is difficult to imagine what more encompassing statement could be made by a guarantor in indicating consent that time of payment may be extended without restriction than to waive "all defenses by reason of extending the time of payment."

Appellants argue that we have held to the contrary, citing to us *Citizens State Bank v. Beermann Bros. Dehy*, 188 Neb. 597, 198 N.W.2d 458 (1972). *Citizens State Bank*, however, has no application to the instant case. In *Citizens State Bank* we held that language providing that "time of payment may be extended without notice thereof," *id.* at 599, 198 N.W.2d at 459, provided for but a single extension no longer than the original period of the note pursuant to § 3-118(f). The language of the note in the instant case is not at all like the language found in the *Citizens State Bank* case. To begin with, on the face of the note it is provided not only that time of payment may be extended without notice thereof but, also, that such extension may be "extended from time to time without notice." This language obviously implies more than a single extension and is obviously intended to meet the very problem raised by our decision in *Citizens State Bank, supra*.

Additionally, as we have already noted, the language of the guaranty itself provides that Ronald Baker waives "all defenses by reason of extending the time of payment." We read that language to mean that even if Ronald Baker had a defense under § 3-118(f), he agreed to waive that defense and therefore cannot now defend on the grounds that he was discharged by reason of an unauthorized extension of time of payment. Having waived such a defense, if indeed one existed, Ronald Baker remained liable on the guaranty. A guarantor is not discharged by an extension of time for payment or performance of the principal obligation if he consents thereto, as where the contract of guaranty expressly or impliedly provides for the extension. See *First Nat. Bank v. Bolzer*, 221 Neb. 415, 377

N.W.2d 533 (1985).

Were we to hold that Ronald Baker was discharged, we, in effect, would be deleting from the guaranty the very language of the guaranty itself. In the instant case the evidence is satisfactory that in executing the guaranty the guarantors consented to more than one extension of the time of payment and waived any defense they had in that regard. For that reason the first assignment of error must be overruled.

The second assignment of error is based upon the argument that the note itself was discharged. In support of the argument Ronald Baker and BCI point out that in the upper left-hand corner there appears the number "10808." A line is then drawn through that number and above it the following appears: "50-10830 replaces." BCI and Ronald Baker then argue that this language signals an intent by the parties to generate a new loan with "possibly new terms." Brief for Appellants at 10. Further, BCI and Ronald Baker argue: "Thus, something happened between March 9, 1982, and April 6, 1982, that had the effect of generating a new loan number and of giving the $70,894.03 debt a 'current' status." Brief for Appellants at 11. The difficulty with this argument is that the parties who have the burden of establishing this defense (BCI and Ronald Baker) have failed to produce any evidence to support their contention. In support of appellants' position they cite to us the case of *First West Side Bank v. Herzog*, 204 Neb. 356, 282 N.W.2d 38 (1979). In that case we said at 360-61, 282 N.W.2d at 41: " 'The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt.' " Appellants then argue to us: "The evidence in the present case indicates that some such subsequent agreement occurred between the Bank and Robert Baker, acting for BCI." Brief for Appellants at 12. If there was some subsequent agreement, it was incumbent upon BCI and Ronald Baker to produce that evidence. The record in this case is silent as to any such subsequent agreement, and the mere fact that some bookkeeping notation appears on the note is insufficient to establish that "there is a specific agreement between the parties that the new note shall extinguish the

original debt."

Aside from the fact that the defendants did not allege in their amended answer that the note was canceled by some subsequent agreement, they did not prove that the note was canceled by some subsequent agreement. The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so they cannot recover upon mere argument alone. See *Center Bank v. Mid-Continent Meats, Inc.*, 194 Neb. 665, 234 N.W.2d 902 (1975). There is simply no basis upon which the appellants' second assignment of error could be sustained. It is therefore overruled.

The third assignment of error is likewise without merit. The argument advanced by BCI and Ronald Baker apparently is that the language found on the reverse side of the note is intended to guarantee collection and not payment and that, therefore, under the provisions of Neb. U.C.C. § 3-416 (Reissue 1980), before the holder may seek collection against the guarantors, it must first reduce its claim to judgment and seek execution which is returned unsatisfied or take such other action as provided for by § 3-416(2). The argument simply is without substance. The guaranty provides: "For value received the endorsers of this note hereby guarantee . . . the payment thereof at maturity or at any time thereafter . . . ." BCI and Ronald Baker argue that because they have guaranteed payment, not only at maturity, but "at any time thereafter," they did not guarantee payment at maturity and therefore could only be guarantors of collection and not of payment. Unfortunately, appellants are unable to cite any authority to us in support of their position. The reason for this inability, however, may be obvious. There simply is no basis for their position. The facts that the holder of a note may elect to sue promptly at maturity or at any time thereafter and the guarantors agree to pay at maturity or thereafter do not change the guaranty from one of payment to one of collection. The language could not be clearer. Each of the guarantors "guarantee[d] . . . the payment" of the note. With an unconditional guaranty of payment, the holder was not required to first seek collection or satisfaction against the maker, but was authorized to go directly against the guarantors. See *International Harvester Co. v. Schultz*, 102 Neb. 753, 169

N.W. 428 (1918). That is what an unconditional guaranty of payment means.

The last assignment of error likewise is of little benefit to BCI or Ronald Baker. The evidence discloses that First National offset moneys on deposit in an account in the name of BCI against various debts owed by BCI, including the note involved in this case. BCI and Ronald Baker argue that, first of all, "[t]he Appellee exercised a set-off against funds which belonged to a third person, and not the Appellant BCI." Brief for Appellants at 16. We are simply at a loss to understand how, even if true, this could be of any benefit to either BCI or Ronald Baker. While there may be some third persons who have claims against First National, that issue is simply not involved in this action. If moneys in BCI's account actually were moneys belonging to a third person, that person may have a right to make such a claim. Certainly BCI and Baker are not in a position to argue a third person's case. Furthermore, should we agree with BCI and Ronald Baker, the net result would be to increase their own indebtedness. The first prong of their argument must be disregarded.

The second prong is to the effect that First National applied some of the proceeds to loans of BCI other than the one on which Ronald Baker was a guarantor and, therefore, Ronald Baker should receive greater credit. The law in Nebraska is clear and to the contrary. We have long held that a bank may set off the funds of a depositor to pay a debt due the bank from the depositor, see, *Stauffer Seeds, Inc. v. Nebraska Sec. Bank*, 222 Neb. 594, 386 N.W.2d 2 (1986), and *State, ex rel. Davis, v. Farmers & Merchants Bank*, 114 Neb. 378, 207 N.W. 666 (1926), and, absent an agreement to the contrary or specific instructions from the debtor, a creditor may apply the proceeds to such debts and in such order as the creditor determines. See, *Diesel Service, Inc. v. Accessory Sales, Inc.*, 205 Neb. 381, 288 N.W.2d 258 (1980); *Fox v. Carman*, 139 Neb. 34, 296 N.W. 343 (1941). The district court committed no error in this regard.

For the reasons set out above, we find that the decision of the district court was in all respects correct, and the judgment must be affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CLAYTON H. SHROUT, RESPONDENT.
402 N.W.2d 263

Filed March 13, 1987. No. 86-109.

Original action. Judgment of disbarment.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an original disciplinary proceeding submitted to this court upon the respondent's voluntary surrender of his license to practice law. Respondent, Clayton H. Shrout, voluntarily surrenders his license and consents to the entry of a disciplinary order against him.

Upon a careful review of the record before us, and based on the respondent's voluntary surrender of his license, his waiver of disciplinary proceedings, and consent to the entry of an order of disbarment against him, we order that the respondent, Clayton H. Shrout, be, and hereby is, disbarred effective March 16, 1987.

JUDGMENT OF DISBARMENT.

LARRY J. NORRIS, APPELLEE AND CROSS-APPELLANT, V. IOWA BEEF PROCESSORS, INC., APPELLANT AND CROSS-APPELLEE, STATE OF NEBRASKA, SECOND INJURY FUND, APPELLEE AND CROSS-APPELLEE.
402 N.W.2d 658

Filed March 13, 1987. No. 86-159.

1. **Workers' Compensation: Second Injury Fund.** Under the statutory scheme of Neb. Rev. Stat. § 48-128 (Reissue 1984), the amount payable from the Second Injury Fund is, ordinarily, the difference between the weekly benefits payable for permanent disability from a second injury which is compensable and the weekly benefits payable for the combined permanent disabilities from a previous injury and such second injury.
2. **Workers' Compensation: Second Injury Fund: Proof.** To recover from the

Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1984), a claimant must prove by a preponderance of evidence (1) a prior permanent partial disability, (2) a second or subsequent injury which is compensable, causing permanent disability, and (3) the combination of permanent disabilities existing after such second or subsequent injury is substantially greater in degree or percentage than permanent disability from the second or subsequent injury, considered by itself and not in conjunction with the prior permanent disability.

3. _____: _____: _____. One claiming against the Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1984), has the burden to prove that the combination of permanent disabilities is substantially greater in degree or percentage than the permanent disability from the second or subsequent compensable injury considered by itself.
4. **Workers' Compensation: Second Injury Fund.** Whether a combination of permanent disabilities, within the purview of Neb. Rev. Stat. § 48-128 (Reissue 1984), is substantially greater than permanent disability from a second or subsequent compensable injury is a question of fact.
5. **Workers' Compensation: Appeal and Error.** Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case.
6. _____: _____. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
7. _____: _____. Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly wrong. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, Neb. Rev. Stat. § 48-185 (Reissue 1984) precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court.
8. **Workers' Compensation: Witnesses.** As the "trier of fact," the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony. Entering into a resolution by the Workers' Compensation Court regarding any conflict of evidence are factors such as the respective interests of the parties in the lawsuit; demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses was corroborated; and the reasonableness or unreasonableness of statements of such witnesses.
9. **Workers' Compensation: Second Injury Fund: Words and Phrases.** With the exception of increased disability resulting from additional injury to the same specific member of the body, as classified by Neb. Rev. Stat. § 48-121(3) (Reissue 1984), *disability*, for the purpose of Neb. Rev. Stat. § 48-128 (Reissue 1984) means the decrease or loss of earning power (capacity) or diminished employability.
10. **Workers' Compensation: Second Injury Fund: Proof.** In addition to establishing an employee's decrease or loss of earning power or diminished

employability, a claimant seeking payment from the Second Injury Fund must also establish that, after the second or subsequent compensable injury, an employee's combined permanent disabilities are *substantially greater* than the permanent disability from the last compensable injury considered by itself.

11. **Workers' Compensation: Second Injury Fund: Words and Phrases.** Under Neb. Rev. Stat. § 48-128 (Reissue 1984), a combination of permanent disabilities is "substantially greater" than permanent disability from the second or subsequent injury when the resulting permanent disability from all causes combined is substantially greater than the disability resulting solely from the second or subsequent compensable injury.
12. **Workers' Compensation: Second Injury Fund.** For the combination of permanent disabilities necessary to sustain a claim against the Second Injury Fund, the prior permanent partial disability or disabilities must interact with the effects of the second or subsequent compensable injury and enhance the permanent disability that otherwise results from the later compensable injury alone.
13. **Workers' Compensation: Appeal and Error.** In an appeal after rehearing in the Nebraska Workers' Compensation Court, the Supreme Court will consider only those issues or questions properly presented and disposed in the Nebraska Workers' Compensation Court.
14. **Appeal and Error.** In the absence of plain error, where an issue is raised for the first time in the Supreme Court, such issue will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Wayne E. Boyd of Smith & Boyd, for appellant.

Dennis J. Mahr, for appellee Norris.

Robert M. Spire, Attorney General, and John R. Thompson, for appellee Second Injury Fund.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Iowa Beef Processors, Inc., now IBP, inc., appeals the award obtained by Larry J. Norris in the Nebraska Workers' Compensation Court. Also, the Nebraska Workers' Compensation Court dismissed the action against the State of Nebraska, Second Injury Fund, impleaded by IBP. Norris cross-appeals on issues regarding the degree of Norris' permanent disability determined by the Nebraska Workers'

Compensation Court, and compensation from the Second Injury Fund. We affirm.

In his petition Norris alleged that as a result of his employment at IBP, he had sustained bodily injuries, and sought compensation for injuries to his legs, shoulders, right arm, and back. IBP filed a "claim against the Second Injury Fund," and the State of Nebraska, Second Injury Fund, was impleaded in the action.

Born on March 23, 1949, Larry Norris, at age 4, sustained accidental injury to his right eye and, since age 7, has had a prosthesis in his right eye socket. Norris has corrected vision in his left eye but has some trouble with peripheral vision in that eye. On account of Norris' loss of sight in the right eye, some prospective employers declined to hire Norris at the risk of possible total blindness resulting from employment. In his written application to IBP for employment in 1976, Norris stated: "I'm blind in my right eye." Similar statements about the absence of sight in Norris' right eye appear in other records of IBP, establishing IBP's knowledge of the disability when IBP hired Norris.

From 1978 through the fall of 1983, IBP employed Norris as a "beef lugger," a job which required Norris to unload trucks and carry quarters of beef which had an average weight of 185 pounds. The lightest pieces of beef weighed 135 pounds, and the quarters had a normal maximum weight of 235 pounds. Norris carried an average of 480 pieces of beef per day, thus daily bearing an average weight of more than 88,000 pounds of beef. While a truck was being unloaded, "fronts" of beef dropped a distance of 2 feet from the delivery truck onto Norris' shoulders. Occasionally, workers slipped and fell on the plant floor, which was slick with animal fat and blood.

In 1980, Norris slipped and fell at IBP, underwent six separate surgical procedures on his knees (three procedures on each knee), and eventually required a patellectomy (removal of kneecap) of his right knee in 1984. Norris also suffered a carpal tunnel syndrome (nerve entrapment at the wrist or elbow) in his right arm, restricting mobility and repetitive work involving Norris' right arm.

As a consequence of his employment at IBP, Norris sustained

various bodily injuries resulting in his inability to be on his feet for any prolonged duration; shoulder problems experienced when Norris pushed or reached with his arms; inability to lift more than 40 pounds; limitations in pushing and pulling leg controls on machinery or equipment; and general difficulty in squatting and crawling or climbing stairs. Loss of sight in the right eye never interfered with Norris' job at IBP.

Since 1981 Dr. John J. Dougherty, an orthopedist, has treated Norris' various injuries. Dr. Dougherty expressed his opinion that Norris has sustained permanent partial disability in five areas on account of injuries sustained at IBP, namely, disability of 1 percent of the right arm, 20 percent of the right knee, 5 to 10 percent of the left knee, and 1 to 2 percent in each shoulder. Referring to the American Medical Association, Guides to the Evaluation of Permanent Impairment (2d ed. 1984), and as an additional evaluation based on the five separate areas of Norris' disability, Dr. Dougherty extrapolated percentages of permanent disability to Norris' body as a whole. According to Dr. Dougherty, Norris sustained the following permanent partial disability to the body as a whole: 1 percent as the result of the arm injury; 8 percent from injury to the right knee; 4 percent on account of injury to the left knee; and 1 percent attributable to each shoulder injury. Dr. Dougherty further extrapolated Norris' disabilities and expressed an opinion that, as an overall disability or combined value of permanent disabilities or impairment, Norris had sustained 36 percent disability of the body as a whole, that is, 24 percent for the loss of sight in the right eye and 12 percent attributable to the other disabilities to Norris' body as a whole.

Additional evidence from Dr. Dougherty unfolded as follows:

> Q. . . . Let's just take a situation where physically he doesn't have any problems with his knees, shoulders, back or right arm. He just has the lost right eye. Add to that the problems you have indicated with those — the knees, shoulders, back and right arm. Would the combined disability of all of those be greater than it would before he had the problems — the other physical problems? Would it increase his disability by virtue of the back, knee, so on?

A. I don't think so. I mean, I'm not sure I quite understand. Are you saying that would he be worse because he has got the eye or not worse?

Q. Yes.

A. I don't think so.

Q. You don't think the eye contributes anything to it?

A. No.

Dr. Dougherty further testified that Norris had no "significant disability" of his back.

Norris hired Karen L. Stricklett, a rehabilitation professional certified in rehabilitation counseling, to assess Norris' employability in view of his several injuries. Stricklett testified that, assuming Norris had no disabilities and based upon his education (high school) and work history, Norris would be able to perform approximately 47 percent of the jobs available in the national economy. In Stricklett's opinion, when all disabilities of Norris are considered cumulatively, Norris would have approximately a 68-percent loss of access to the labor market, meaning that Norris was able to perform only 15 percent of the jobs in the national economy. If Norris' disability consisted only of the loss of vision, Norris would experience a 28-percent decrease in employment options. When asked whether the loss of Norris' right eye, combined with his other injuries, would be an obstacle in obtaining employment, Stricklett answered: "I feel that it would affect it to some extent." Concerning the effect of Norris' disabilities upon his earning capacity, Stricklett expressed: "[I]t certainly appears that Mr. Norris' job options as well as his earnings potential have been affected by his numerous injuries at Iowa Beef Processors." However, Stricklett never offered a comparative evaluation of Norris' employability, that is, employability in view of all Norris' permanent disabilities compared with Norris' employability which would have resulted from the injuries at IBP, considered alone and apart from the loss of sight in Norris' right eye.

Norris received a vocational rehabilitation evaluation by the State of Iowa. Although blindness in the right eye was listed as one of Norris' disabilities, the Iowa report stated: "Disability wise, the the [sic] back, knees will probably not be plus's [sic] in

the Industrial area." The Iowa report made no mention that Norris' lack of sight in the right eye would be a hindrance to employment, but stated that "the problem which interfered with the area evaluation projects was carpal tunnel syndrome. . . . We were unable to identify problems specifically resulting from the blindness."

On rehearing, the three-judge panel found that Norris had sustained a 20-percent permanent partial disability to his right leg, a 10-percent permanent partial disability to his left leg, a 1-percent permanent partial disability to his right arm, and, as a consequence of the shoulder injuries, a 5-percent permanent partial disability to Norris' body as a whole. The Workers' Compensation Court found that Norris had failed to prove any disability to his back and denied recovery referable to the back problem alleged by Norris. The Nebraska Workers' Compensation Court ordered payment of weekly benefits, as well as payment of medical and hospital expenses, and determined that Norris was entitled to vocational rehabilitation.

In denying the claim against the Second Injury Fund, two members of the panel (one judge dissenting) stated:

> While it is true that the plaintiff has vision in one eye only, and that this has been true during the whole of his employment by the first named defendant and was reflected on the plaintiff's application for employment with the first named defendant, the Court does not believe that the degree or percentage of disability suffered by the plaintiff today is substantially greater than that which would have resulted from the knee, shoulder and arm injuries considered alone and of themselves.

In his dissent, one judge expressed:

> Translating each of the injuries into whole body impairments, all of which are charged to Iowa Beef Processors, Inc., other than the loss of the eye, the defendant Iowa Beef Processors, Inc., would pay 42.8 per cent of the total disability compensation and the Second Injury Fund would pay 57.2 per cent.

Apparently, the dissenting judge in the compensation court, while agreeing with the other judges in a finding of 5 percent

disability to Norris' body as a whole on account of the shoulder injuries, used the sum of Dr. Dougherty's extrapolated percentages of disability to Norris' body as a whole (arm—1 percent, legs—12 percent, and eye—24 percent) in determining disability to Norris' body as a whole, arriving at 42 percent disability of the body as a whole. Based on the ratio between Norris' loss of sight (24 percent) and the cumulative disability to the body as a whole (42 percent), the dissenting judge apportioned payment of Norris' weekly benefits, that is, 42.8 percent to IBP and 57.2 percent to the Second Injury Fund. Because the majority of the compensation court had concluded that Norris' combined disabilities (nonindustrial and industrial accidents) were not substantially greater than the disability from Norris' injuries at IBP considered by themselves, the compensation court's majority never reached the question of apportionment between IBP and the Second Injury Fund as did the dissenting judge.

IBP asserts that Norris has sustained sufficient permanent disability to warrant payment of weekly benefits from the Second Injury Fund. IBP contends, therefore, liability for Norris' weekly benefits should have been apportioned between IBP and the Second Injury Fund. To support its argument, IBP relies on Dr. Dougherty's extrapolated percentages for the overall disability or combined value of Norris' disabilities of the body as a whole—36 percent to the body as a whole, that is, 12 percent attributable to injuries of Norris' arm, legs, and shoulders, and 24 percent pertaining to Norris' loss of sight. IBP suggests that, on the basis of Dr. Dougherty's evaluations of anatomical loss and because Norris' loss of sight accounts for disability of 24 percent out of the 36 percent expressed by Dr. Dougherty, the Second Injury Fund is liable for 24/36, or 2/3, of Norris' weekly benefits. Thus, IBP would be liable for only one-third of such benefits. Payment from the Second Injury Fund is governed by Neb. Rev. Stat. § 48-128 (Reissue 1984), which provides in part:

> If an employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, which is or is likely to be a hindrance or obstacle to his obtaining employment or obtaining reemployment if the

> employee should become unemployed and which was known to the employer prior to the occurrence of a subsequent compensable injury, receives a subsequent compensable injury resulting in additional permanent partial or in permanent total disability so that the degree or percentage of disability caused by the combined disabilities is *substantially greater* than that which would have resulted from the last injury, considered alone and of itself; and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability, and for the additional disability the employee shall be compensated out of a special trust fund created for that purpose, which sum so set aside shall be known as the Second Injury Fund.

(Emphasis supplied.)

For liability of the Second Injury Fund, statutory predecessors of the present § 48-128 required that the combined injuries must result in "total disability," see § 48-128 (Reissue 1968), whereas, by amendment, see § 48-128 (Reissue 1974), the present statute relates to claims based on additional permanent partial disability or permanent total disability.

Under the statutory scheme of § 48-128, the amount payable from the Second Injury Fund is, ordinarily, the difference between the weekly benefits payable for permanent disability from a second injury which is compensable and the weekly benefits payable for the combined permanent disabilities from a previous injury and such second injury. See 2 A. Larson, The Law of Workmen's Compensation § 59.34(a) (1986).

To recover from the Second Injury Fund, § 48-128, a claimant must prove by a preponderance of evidence (1) a prior permanent partial disability, (2) a second or subsequent injury which is compensable, causing permanent disability, and (3) the combination of permanent disabilities existing after such second or subsequent injury is substantially greater in degree or percentage than permanent disability from the second or subsequent injury, considered by itself and not in conjunction

with the prior permanent disability.

One claiming against the Second Injury Fund has the burden to prove that the combination of permanent disabilities is substantially greater in degree or percentage than the permanent disability from the second or subsequent compensable injury considered by itself. *Flansburg v. Giza*, 284 Minn. 199, 169 N.W.2d 744 (1969). See, also, *Benson v. Barnes & Barnes Trucking*, 217 Neb. 865, 354 N.W.2d 127 (1984) (on employer's claim for apportionment of benefits and payment by the Second Injury Fund, burden of proof is on employer).

Whether a combination of permanent disabilities, within the purview of § 48-128, is substantially greater than permanent disability from a second or subsequent compensable injury is a question of fact. See *Matter of Garcia v Brassiere Rest.*, 66 A.D.2d 930, 411 N.Y.S.2d 448 (1978).

Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. Neb. Rev. Stat. § 48-185 (Reissue 1984); *Zaleski v. Farmland Foods*, 219 Neb. 157, 361 N.W.2d 523 (1985). In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Vredeveld v. Gelco Express*, 222 Neb. 363, 383 N.W.2d 780 (1986); *Knudsen v. Metropolitan Utilities Dist.*, 220 Neb. 902, 374 N.W.2d 56 (1985). Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly wrong. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. *Vredeveld v. Gelco Express, supra; Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985). As the "trier of fact," the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony. Entering into a resolution by the Workers' Compensation Court regarding any

conflict of evidence are factors such as the respective interests of the parties in the lawsuit; demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses was corroborated; and the reasonableness or unreasonableness of statements of such witnesses. *Thompson v. Monfort of Colorado*, 221 Neb. 83, 375 N.W.2d 601 (1985).

Weekly benefits for total disability are determined in accordance with Neb. Rev. Stat. § 48-121(1) (Reissue 1984) of the Nebraska Workers' Compensation Act. For partial disability, weekly benefits are determined by § 48-121(2), except in cases of a specific "schedule injury" classified in § 48-121(3).

An analysis of the bases for payment of weekly benefits is contained in *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 253 N.W.2d 30 (1977):

> Section 48-121 . . . provides for compensation for three categories of job-related disabilities. Subdivision (1) sets the amount of compensation for total disability; subdivision (2) sets the amount of compensation for disability partial in character, except in cases covered by subdivision (3); and subdivision (3) sets out "schedule" injuries to specified parts of the body with compensation established therefore. Disability under subdivisions (1) and (2) refers to loss of employability and earning capacity, and not to functional or medical loss alone. [Citations omitted.] Thus losses in bodily function, so far as subdivisions (1) and (2) are concerned, are important only insofar as they relate to earning capacity and employability. [Citation omitted.]
>
> For claims falling under subdivision (3), however, it is immaterial whether an industrial disability is present or not. [Citation omitted.] . . . There is, however, an exception to this rule. Where "an employee has suffered a schedule injury to some particular member or members, and some unusual or extraordinary condition as to other members or any other part of the body has developed," he may be compensated under subdivision (1) or (2) of

section 48-121. [Citations omitted.]

> . . . [I]f an employee suffers a schedule injury which falls under subdivision (3), of section 48-121 . . . he is entitled only to the compensation provided for in that subdivision, unless some unusual or extraordinary condition as to other members or other parts of the body has developed. The presence or absence of industrial disability is immaterial in cases falling under subdivision (3). If the injury falls under either subdivision (1) or (2), however, a determination must be made as to the employee's loss of employability or earning capacity, and loss of bodily function is not at issue.

Id. at 384-85, 253 N.W.2d at 33-34.

> "Earning power," as used in Neb. Rev. Stat. § 48-121(2) . . . is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted.

Akins v. Happy Hour, Inc., 209 Neb. 236, 239, 306 N.W.2d 914, 916 (1981).

Franzen v. Blakley, 155 Neb. 621, 52 N.W.2d 833 (1952), involved an employee's claim against the Second Injury Fund. Franzen's first accident, nonindustrial in origin, caused permanent partial disability to Franzen's right wrist. A subsequent and compensable injury caused permanent partial disability of Franzen's left hand. After the second accident, Franzen was "not able to do the work of her former employment, or any other kind of work that required the effective use of her hands." *Id.* at 624, 52 N.W.2d at 836. A physician testified that Franzen was unemployable as the result of the condition of her hands. In *Franzen*, this court stated at 628, 52 N.W.2d at 838:

> [P]laintiff's disability to her right hand is not, as such, a compensable injury under section 48-121 . . . . It is a fact condition which becomes material in applying the provisions of section 48-128 . . . . [T]he Legislature in section 48-128 . . . was not undertaking to provide

> compensation for a previous disability other than one caused by disease, as such, but rather was undertaking to provide compensation for permanent total disability resulting from a combination of the previous fact condition with a compensable injury.

Subsequently, in *Camp v. Blount Bros. Corp.*, 195 Neb. 459, 238 N.W.2d 634 (1976), this court considered a claim by a carpenter (Camp) against the Second Injury Fund, based on a compensable prior disability of 25 percent permanent partial disability to Camp's right foot and a subsequent compensable injury causing permanent partial disability to Camp's left foot, as well as 5 percent permanent partial disability "to the body as a whole." This court noted in *Camp* at 463, 238 N.W.2d at 637: "The medical testimony is that the disability to the plaintiff's feet prevents him from doing rough carpenter work, and the only work he could do would be sitting down at a bench, not moving around or lifting anything." The State contended that the Second Injury Fund was not liable because Camp's injuries were "schedule injuries" compensated under § 48-121(3). Citing *Franzen v. Blakley, supra*, this court acknowledged that "the purpose of section 48-128 . . . is not to provide compensation for the previous disability but to provide compensation for permanent total disability resulting from a combination of the previous fact condition with a compensable injury." 195 Neb. at 464, 238 N.W.2d at 638. In *Camp*, the court concluded: "Section 48-128 . . . makes no distinction between a compensable first injury or a noncompensable injury. It is the previous fact condition combined with a second compensable injury causing permanent total disability in fact that establishes the right of the employee to compensation from the Second Injury Fund." 195 Neb. at 465, 238 N.W.2d at 638.

In *Akins v. Happy Hour, Inc., supra*, the employee's left arm had been amputated in an automobile accident, in 1952, which was not work-related. Akins severely cut the thumb of his right hand in 1978 during an industrial accident and sustained a "45 to 55 percent disability of the thumb, which translates to a 10 to 12 percent disability of the body as a whole. The total physical disability suffered from the combined injuries is a 62 percent permanent disability of the body as a whole." 209 Neb. at 237,

306 N.W.2d at 915. After noting Akins' unsuccessful attempt to obtain similar employment after his employer's cessation of business, we stated in *Akins*: "[P]laintiff's employability with his combined disabilities is substantially less than it would have been if he had only the injury to his thumb." 209 Neb. at 240, 306 N.W.2d at 917. Consequently, in *Akins* this court determined that the employer was liable for 12 percent disability of the body as a whole and the Second Injury Fund was liable for the remaining permanent partial disability of the body as a whole.

From the foregoing cases, a rule has evolved concerning a claim against the Second Injury Fund, § 48-128: With the exception of increased disability resulting from additional injury to the same specific member of the body, as classified by § 48-121(3), *disability* for the purpose of § 48-128 means the decrease or loss of earning power (capacity) or diminished employability. Frequently, "disability" is expressed in terms of a percentage of disability to the body as a whole, that is, anatomical loss of function. As a practical matter, in the absence of other evidence, such percentage of disability of "the body as a whole" may be accepted as the index for determination of weekly benefits under § 48-121(2). See *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 253 N.W.2d 30 (1977).

However, in addition to establishing an employee's decrease or loss of earning power or diminished employability, a claimant seeking payment from the Second Injury Fund must also establish that, after the second or subsequent compensable injury, an employee's combined permanent disabilities are *substantially greater* than the permanent disability from the last compensable injury considered by itself.

Under § 48-128, a combination of permanent disabilities is "substantially greater" than permanent disability from the second or subsequent injury when the resulting permanent disability from all causes combined is substantially greater than the disability resulting solely from the second or subsequent compensable injury. See *Rex E. Lantham Co. v. Indus. Com'n of Utah*, 717 P.2d 255 (Utah 1986).

For the combination of permanent disabilities necessary to sustain a claim against the Second Injury Fund, the prior

permanent partial disability or disabilities must interact with the effects of the second or subsequent compensable injury and enhance the permanent disability that otherwise results from the later compensable injury alone. See *Bordo Citrus Products v. Varnadore*, 395 So. 2d 260 (Fla. App. 1981). See, also, *Davis v. Conger Life Insurance Company*, 201 So. 2d 727 (Fla. 1967), where the Florida Supreme Court, construing a former statute substantially similar to Nebraska's § 48-128, held that the combined disabilities must have the "total effect of creating a greater degree of disability to the body as a whole and a claimant's wage-earning capacity than would have resulted from the last injury considered by itself and not in conjunction with a previous injury." 201 So. 2d at 729.

As expressed in 2 A. Larson, The Law of Workmen's Compensation § 59.32(g) at 10-447 (1986):

> Although the prior impairment need not combine with the compensable injury in any special way, it must add something to the disability before the Special Fund [Second Injury Fund] can become liable. In other words, it is not enough to show that the claimant had some kind of handicap, if that handicap contributed nothing to the final disability.

Norris has unquestionably experienced problems in locomotion, lifting, reaching, and standing for protracted periods. We recognize, and do not minimize or disregard, those limitations consequent to Norris' injuries involving his knees, arm, and shoulders. The question is not whether those injuries are serious. The gravity of those individual injuries is obvious and beyond question. Rather, the issue is whether Norris' disability from loss of sight, when combined with the permanent disability from injuries to his knees, arm, and shoulders, resulted in permanent disability *substantially greater* in degree or percentage than would have resulted from Norris' injuries at IBP, considered by themselves and apart from Norris' loss of sight.

Dr. Dougherty rendered his opinion about Norris' permanent disabilities and expressed his evaluation in terms of percentages of disability sustained in specific areas of Norris' body, as well as an overall disability or combined value for

disability resulting from all injuries. On the basis of Dr. Dougherty's extrapolations, the loss of sight in Norris' eye accounted for 24 percent out of the 36 percent resulting from the overall disability or combined value of all permanent disabilities sustained by Norris. One might reasonably conclude that 36 percent (combination value of all disabilities) is substantially greater than 12 percent (disability from injuries at IBP) and that 24 percent (loss of sight) is a substantial contribution to Norris' overall disability or combined value of disabilities. As a simple arithmetical expression, when the various and individual percentages assigned to loss of function ("body as a whole") are added together, the sum of permanent partial disabilities for Norris' body as a whole is 42 percent—24 percent attributable to Norris' loss of sight, 18 percent to the injuries at IBP. From a purely mathematical analysis, one might conclude that 42 percent (combined disabilities) is substantially greater than 18 percent (disability from injuries at IBP).

In Dr. Dougherty's testimony there is an internal inconsistency or self-contradiction regarding Norris' industrial disability in relation to the loss of sight in Norris' right eye. Dr. Dougherty's evaluation of Norris' disability, after injuries at IBP, went further than an evaluation expressed in terms of overall disability, combined value of disabilities, and the anatomical loss in Norris' bodily function. Given Norris' work history, Dr. Dougherty expressed his opinion that Norris' loss of sight contributed nothing to Norris' present disability. If that testimony from Dr. Dougherty is accepted, Norris' disability, after the injuries at IBP, was unaffected by the prior disability on account of loss of sight in Norris' right eye. Cf. *Franzen v. Blakley*, 155 Neb. 621, 52 N.W.2d 833 (1952) (medical testimony that the employee was "unemployable" as the result of the combined disabilities). Cf., also, *Camp v. Blount Bros. Corp.*, 195 Neb. 459, 238 N.W.2d 634 (1976) (medical testimony that combined disabilities prevented employee's work as a carpenter). From Dr. Dougherty's testimony, the majority of the Workers' Compensation Court may have concluded that the loss of sight had no effect on any industrial disability sustained by Norris or that the contributory effect of the loss of eyesight, as a factor of Norris' employability or

earning power, was insubstantial, when the disability on account of injuries at IBP is considered apart from Norris' combined disabilities, nonindustrial and industrial.

Resolution of such contradictory opinions from Dr. Dougherty was a question for the compensation court as the "trier of fact."

> A conflict or contradiction regarding an expert's opinion need not result from opinions expressed by different experts. A conflict or contradiction of opinions may arise in the course of testimony given by the same expert witness. A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact.

Zaleski v. Farmland Foods, 219 Neb. 157, 161, 361 N.W.2d 523, 526 (1985).

The rehabilitation counselor, Stricklett, testified that Norris' "job options as well as his earnings potential have been affected by his numerous injuries at Iowa Beef Processors," and also testified that the combination of injuries and resultant disability "would affect [employability] to *some* extent." (Emphasis supplied.) The compensation court may have concluded that the rehabilitation counselor's nebulous and equivocal statements about Norris' particular employability fail to supply a sound basis for comparison of Norris' disabilities; that is, a failure to establish that Norris' loss of earning power or employability, as the result of combined disabilities, is "substantially greater" than would have resulted from injuries sustained at IBP when such injuries at IBP are considered by themselves and apart from Norris' loss of sight. The Iowa rehabilitation evaluators indicated their inability to "identify problems specifically resulting" from the loss of sight in Norris' right eye as a hindrance to future employment.

Under the standard of review imposed on this court, we are unable to conclude that the findings of the Nebraska Workers' Compensation Court are clearly incorrect.

In his cross-appeal Norris maintains the Nebraska Workers' Compensation Court is incorrect in its determination of his loss of earning capacity, and contends his injuries entitle him to recover from the Second Injury Fund. Also, Norris asserts that

the Nebraska Workers' Compensation Court has a conflict of interest in this case, because § 48-128 charges that court with "the conservation of the assets of the Second Injury Fund," while the Nebraska Workers' Compensation Court is also the tribunal adjudicating questions involving disabilities which may bear upon recovery from the Second Injury Fund.

Our disposition of IBP's appeal also disposes of Norris' cross-appeal regarding payment from the Second Injury Fund.

Next, concerning Norris' contention that the findings of the Nebraska Workers' Compensation Court are incorrect in its determination of the weekly disability benefits payable to Norris, we are unable to state that the findings of the compensation court are clearly incorrect. The award of compensation is supported by the record. Denial of compensation regarding an alleged injury to Norris' back is a permissible finding in view of Dr. Dougherty's testimony that Norris had no significant disability to his back. We cannot conclude that the Nebraska Workers' Compensation Court was clearly incorrect in its findings determinative of weekly benefits payable to Norris.

Norris' assertion that the Nebraska Workers' Compensation Court has a conflict of interest regarding the Second Injury Fund is an interesting question—whether the Nebraska Workers' Compensation Court, as custodian of the Second Injury Fund and charged with conservation and preservation of that fund, is the proper tribunal for adjudication of claims against the Second Injury Fund. However, that question was never raised in the Nebraska Workers' Compensation Court. In an appeal after rehearing in the Nebraska Workers' Compensation Court, the Supreme Court will consider only those issues or questions properly presented and disposed in the Nebraska Workers' Compensation Court. See, *State v. Fletcher*, 221 Neb. 562, 378 N.W.2d 859 (1985); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985). "In the absence of plain error, where an issue is raised for the first time in the Supreme Court, such issue will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition." *Holden v. Urban, ante* p. 472, 474, 398 N.W.2d

699, 701 (1987). Consequently, we do not address any question concerning a conflict of interest asserted by Norris.

Finally, because IBP's appeal raised a question concerning apportionment between the Second Injury Fund and IBP regarding the payment of weekly benefits, and did not involve the amount of compensation payable to Norris, an attorney fee cannot be awarded to Norris under Neb. Rev. Stat. § 48-125 (Reissue 1984). On his cross-appeal, Norris has failed to obtain an increase in the amount of compensation awarded. Therefore, Norris is not entitled to an attorney fee on his cross-appeal. See § 48-125.

Inasmuch as we are unable to conclude that any finding by the Nebraska Workers' Compensation Court is clearly incorrect, the judgment and award entered by the Nebraska Workers' Compensation Court are affirmed.

AFFIRMED.

IN RE INTEREST OF STANLEY KINNEBREW, ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON. STATE OF NEBRASKA, APPELLEE, V. STANLEY KINNEBREW, APPELLANT.

402 N.W.2d 264

Filed March 13, 1987. No. 86-328.

1. **Mental Health: Appeal and Error.** A district court reviews the determination of a mental health board de novo on the record.
2. _____: _____. The standard of review of this court, in mental health proceedings, requires that a final order made by the district court be affirmed unless this court can say, as a matter of law, that the order is not supported by clear and convincing evidence.
3. **Mental Health: Evidence: Appeal and Error.** The transcript of the proceeding before a mental health board may not be treated as evidence before the board, the district court, or this court unless the facts in the transcript are offered as evidence, are not objected to, and are reviewed by the trier of fact.
4. **Mental Health: Proof: Expert Witnesses.** In proving the dangerousness of a mentally ill person as manifested by "evidence of inability to provide for his basic human needs," within the meaning of Neb. Rev. Stat. § 83-1009(2) (Cum. Supp. 1986), expert testimony may be used to prove such a condition.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays, for appellant.

Michael G. Heavican, Lancaster County Attorney, and Mary L. Thramer, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

Appellant, Stanley Kinnebrew, was found by the Lancaster County Mental Health Board (hereafter board) to be a mentally ill and dangerous person, as defined by Neb. Rev. Stat. § 83-1009 (Cum. Supp. 1986). Appellant was committed to the Department of Public Institutions for inpatient treatment. Kinnebrew appealed to the Lancaster County District Court, which affirmed the order of commitment by the board. Kinnebrew timely appealed to this court. We affirm.

Before a person may be committed for treatment by a mental health board, it is necessary that that person be found to be mentally ill and that the person presents a substantial risk of harm to others or to himself. § 83-1009; *In re Interest of Ely*, 220 Neb. 731, 371 N.W.2d 724 (1985). In the present case, appellant was found to be a mentally ill person and a person who presented a substantial risk of serious harm to himself because of his inability to provide for his basic human needs, including food, clothing, shelter, or essential medical care. § 83-1009(2). In this court, appellant does not argue that the finding of mental illness is incorrect, but only that the court erred in finding appellant was dangerous to himself.

In mental commitment proceedings the district court reviews the determination of the mental health board de novo on the record. The standard of review by this court requires that a final order made by the district court must be affirmed unless this court can say, as a matter of law, that the order is not supported by clear and convincing evidence. See *In re Interest of Ely, supra*.

In the hearing before the board, the only evidence adduced

was that of a staff psychiatrist at the Lincoln Regional Center, Dr. Somasundaram Rajendran. This witness testified that in his expert opinion appellant was suffering from a mental illness and that

> [i]n my initial impression he is suffering from schizo-effective disorder. It is a form of psychosis where the person loses contact with his surroundings and does not share reality with other people, becomes delusional, may have hallucinations, also have mood changes, depression, and not able to function to their potential.

Dr. Rajendran also testified that in his expert opinion appellant "would not be able to meet his basic needs if left alone . . . [l]ike eating, taking care of his body needs, taking medication, able to communicate with other people."

The evidence of the psychiatrist was the only evidence before the board and was marked, in the district court, as exhibit 1. The record before us also contains a "transcript," which contains the pleadings before the board, consisting of the petition before the board, the warrant of arrest with a return of service, the summons to a hearing, the "emergency admittance pursuant to certificate of a peace officer of person alleged to be mentally ill or alcoholic and dangerous," seven pages of a supplementary police report, a praecipe, and the "order of commitment for observation." This transcript was marked as exhibit 2 before the district court. Both exhibits were received, without objection, in the de novo hearing before the district court.

Basic to the difficulties presented by this case is the problem that at some time in the briefs each of the parties treats the hearsay evidence contained in the transcript as fact, while the basic thrust of Kinnebrew's appeal is that there were no facts before the board to justify a finding of appellant's dangerousness to himself because of his inability to take care of his basic needs.

Appellant states in his brief, in his "Statement of Facts":

> Mr. Kinnebrew was admitted to the Lincoln Regional Center on an Emergency Peace Officer's Certificate (E2) which stated that he was brought into the Lincoln Police Department on November 10, 1985 by friends who

> claimed that Mr. Kinnebrew was withdrawn, had quit eating and would not leave his room.. Mr. Kinnebrew was examined by staff psychiatrist Dr. Somasundaram Rajendran.

Amended Brief for Appellant at 5.

The emergency peace officer's certificate referred to in the foregoing statement as "E2," together with the supplementary police report, sets out the following events, some of which are set out in appellee's brief in the "Statement of Facts" therein. On November 10, 1985, appellant, a student at the University of Nebraska, was brought into the Lincoln Police Department by friends who stated that appellant was withdrawn, had not spoken for approximately 3 weeks, had not been eating, and had not been sleeping in his dormitory room. When asked what precipitated bringing the appellant into the police department, one of appellant's friends reported that appellant "refused to acknowledge their existence" earlier that evening, but appellant finally "advised them that something had happened that he didn't want to talk about." Appellant's friends reported that they got the impression he had been assaulted by someone in an unknown manner and that he was so ashamed of it that he did not want to talk to anyone. When brought in appellant was observed to be without a coat, although the evening was chilly, and was wearing dirty pants, a sweatshirt, and shoes with no socks. He appeared to be clean, as if he were bathing on a regular basis, but appeared disoriented and tired.

It is obvious that if exhibit 2, the "transcript," would be considered as evidence before the board and the district court, there is more than enough evidence to support the finding that appellant was dangerous to himself. We hold, however, that the transcript from the board cannot be considered as evidence before the board or the district court unless the facts in the transcript are offered as evidence, are not objected to, and are received by the trier of fact. Neb. Rev. Stat. § 83-1059 (Reissue 1981) provides: "The rules of evidence applicable in civil proceedings shall be followed at all hearings held under this act [the Nebraska Mental Health Commitment Act]. In no event shall evidence be considered which is inadmissible in criminal proceedings."

Exhibit 2, consisting of the transcript of the proceedings before the board, cannot be considered as evidence before the board, before the district court on review, or before this court. The numerous factual allegations in that transcript, many of which are set out as facts in the "Statement of Facts" in the parties' briefs, may not be considered as evidence.

Recognizing that, and applying "the rules of evidence applicable in civil proceedings," we examine the only testimony before the board and before the district court on review. Dr. Rajendran was the only witness, and he testified as an expert. He testified that in forming his opinions as to appellant's condition, he relied on "[i]nformation in the emergency peace officer's certificate, information that's provided by other staff members in the hospital, information we obtained from the family, his friends, from school." In making his diagnosis, the doctor testified that he also relied on "[m]y own personal observation and the history, and the information from other staff."

The rules of evidence applicable to expert witnesses include Neb. Evid. R. 703, 704, and 705 (Neb. Rev. Stat. §§ 27-703, 27-704, and 27-705 (Reissue 1985)). Those rules provide:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

§ 27-703.

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

§ 27-704.

> The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on

cross-examination.
§ 27-705.

Applying those rules, as required by § 83-1059, to the proceedings in this case, the result is clear that the board had before it an expert's opinion that appellant was mentally ill and could not meet his basic human needs. That opinion was based on the history obtained by the doctor and on the doctor's personal observations, which included the doctor's personal knowledge about appellant's eating and about the fact that appellant's prescribed medication had to be administered by injection because the appellant would not take it.

The doctor was cross-examined by appellant's counsel, and appellant established that he was not physically ill. The board was not requested to have the doctor set out all of the underlying facts on which he based his opinions, nor did the board require the underlying facts to be disclosed. The board could have so ordered, if it desired, under the provisions of rule 705. No evidence was adduced by appellant.

The unrefuted expert testimony before the board, the district court, and this court establishes that appellant was dangerous to himself in that he could not provide for his own basic needs. That opinion was accepted by the board, which observed the only witness in the presence of appellant. It was accepted by the reviewing court. Such evidence, which was not controverted, constitutes clear and convincing evidence sufficient to support the board's order.

Appellant seems to contend that there was no evidence in the record concerning appellant's inability to provide for his basic needs. Appellant confuses the provisions of § 83-1009(1) and (2). Section 83-1009(1) provides that a mentally ill person shall be considered "dangerous" if that person presents "[a] substantial risk of serious harm" to others as "manifested by evidence of recent violent acts or threats . . . ." Section 83-1009(2) provides that before the commitment of a mentally ill person on grounds that that person presents a danger to himself, the evidence must establish that such a person presents "[a] substantial risk of serious harm to himself . . . within the near future as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm or evidence of

inability to provide for his . . . basic human needs . . . ." Section 83-1009(1) is concerned with the manifestation of dangerousness to others as shown by acts. Those acts can be specifically identified and, by statute, must be recent. The same reasoning is to be applied to the portion of § 83-1009(2) with regard to dangerousness of the mentally ill person to himself by the specifically identifiable act of suicide or the threat of suicide. Those specific acts must be shown to be recent.

A different situation is presented with regard to the dangerousness of a mentally ill person to himself as manifested by "inability to provide for his . . . basic human needs." Inability is defined as "the quality or state of being unable : lack of ability : lack of sufficient power, strength, resources, or capacity." Webster's Third New International Dictionary, Unabridged 1139 (1981). Inability is not always shown by an identifiable act, but by evidence showing the lack of a quality or capacity to care for oneself. In proving the dangerousness of a mentally ill person as manifested by "evidence of inability to provide for his . . . basic human needs" within the meaning of § 83-1009(2), expert testimony may prove such a condition. If expert testimony is so used, that testimony would ordinarily concern the capacity of the person at the time of his examination by a physician during the mental health commitment proceeding, and need not concern acts before the beginning of the proceeding.

Such evidence, of course, whether it be solely expert testimony or not, must be clear and convincing to the trier of fact before the trier of fact can determine the mentally ill person is dangerous to himself. In the instant case, there was admissible expert testimony adduced that appellant could not provide for his basic needs. That testimony was properly received by the board pursuant to the laws of evidence of this State and was sufficient to constitute clear and convincing evidence to support the board's finding. There was, in addition, other convincing evidence before the board beyond the doctor's expert opinion, because the doctor personally knew that appellant was not eating properly and that appellant's prescribed medication had to be injected because appellant would not take it. The order of the district court, affirming the

board, is supported by clear and convincing evidence and is affirmed.

We note in passing the manner in which these mental health proceedings were handled. First of all, the form petition constituting the basis for this commitment states the petition is filed "pursuant to the provisions of L.B. 806 (Laws 1976)," hardly a readily helpful reference in 1985 or later. That legislative bill has been codified as Neb. Rev. Stat. §§ 83-1001 et seq. since 1976.

We also note that there were at least seven persons, in addition to appellant's friends who initially brought him to the police station seeking help, who knew of appellant's condition before he got into the mental health process. None of these witnesses were called. We have a situation comparable to that in *In re Interest of Ely*, 220 Neb. 731, 371 N.W.2d 724 (1985). In the *Ely* case, the evidence of the only psychiatrist who testified regarding Ely's ability to provide for his basic needs was determined to be insufficient to justify commitment. In this case, the sole evidence of the psychiatrist was determined to be sufficient. The triers of fact in these difficult and important cases are entitled to a broader base for their decisions, particularly when many witnesses are cognizant of basic facts.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROGER A. POINTER, APPELLANT.

402 N.W.2d 268

Filed March 13, 1987. No. 86-458.

1. **Trial: Evidence: Pretrial Procedure: Appeal and Error.** In a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal.

2. **Witnesses: Trial.** It is within the sound discretion of the trial court to allow testimony from a witness who is in violation of a sequestration order.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

James H. Buhrmann of Buhrmann & Johnson, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

Defendant, Roger A. Pointer, was convicted after jury trial of burglary in violation of Neb. Rev. Stat. § 28-507 (Reissue 1985). The evidence at trial showed that defendant, with others, broke into a bar and stole substantial quantities of beer, lesser quantities of intoxicating liquor, and other items. Defendant was sentenced to 5 years' probation, with conditions including up to 90 days of nighttime local incarceration.

Defendant appeals, assigning two errors: (1) "That the trial court failed to suppress the statements of the accused"; and (2) "The trial court abused its discretion in failing to order a mistrial after being informed that a police officer had talked to a witness about the testimony in the case at bar while both were sequestered." We affirm.

With regard to the first assignment of error, the record shows that no objection was made at trial to the testimony of Officer Clark concerning defendant's oral statements made to the officer. There had been a hearing, before trial, on defendant's motions to suppress physical evidence and to suppress his statements. The motions were overruled at that hearing. At trial, defendant's counsel examined the State's witness who testified as to defendant's statements as to foundation, but did not further cross-examine the witness nor object to the witness' testimony. The evidence at trial concerning the statements was received without objection.

Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103 (Reissue 1985), provides in part:

> (1) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:
>
> (a) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context.

The error alleged has not been preserved for our review. In *United States v. Udey*, 748 F.2d 1231, 1240 (8th Cir. 1984), the court stated: "[N]o objection was made to Agent Blasingame's testimony regarding those statements. Accordingly, the issue was not properly preserved for appeal because no objection was made at trial to the admission of the testimony. FED.R.EVID. 103 . . . ." See, also, *United States v. Vitale*, 728 F.2d 1090 (8th Cir. 1984); *United States v. Wagoner*, 713 F.2d 1371 (8th Cir. 1983).

Neb. Evid. R. 103 is identical with Fed. R. Evid. 103. Without an objection by defendant at trial, the trial court has no obligation to interject itself into the proceedings to make rulings not requested. Such actions might well trample on defendant's trial tactics not known to the court. The record before us does not include the instructions given in the case, so we do not know if the question of the voluntariness of defendant's statements was submitted to the jury (see *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985)). Defendant may have wanted the statements before the jury and may have been setting the stage for a jury argument on that issue. The trial court could not know, and is not required to guess, as to defendant's motivation in not objecting. The trial court in this case refrained from voluntarily interjecting objections to the State's testimony, and acted properly in this instance. Under rule 103(1), there is nothing for this court to review.

This court has consistently held that a defendant may not predicate error on the admission of evidence to which timely objection was not made. *State v. Laymon*, 217 Neb. 464, 348 N.W.2d 902 (1984); *State v. Holland*, 213 Neb. 170, 328 N.W.2d 205 (1982). That general rule has been applied specifically in cases where a motion in limine has been denied in a separate hearing but no objection to the same evidence was made at the

trial of the case. Uniformly, we have held that the alleged error was not presented for our review because of the lack of objection to the evidence at the trial. *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983); *State v. Harper*, 215 Neb. 686, 340 N.W.2d 391 (1983).

We note our holding in *State v. Van Ackeren*, 200 Neb. 812, 265 N.W.2d 675 (1978). In that case, we held that in a criminal case where a defendant has filed a timely pretrial motion to suppress physical evidence and the motion is denied after hearing, an objection at trial is not essential to preserve the question for review on appeal. That case involved a motion to suppress physical evidence under the fourth amendment to the U.S. Constitution or article I, § 7, of the Nebraska Constitution, while in the case at bar the defendant seeks the protection of the fifth amendment to the U.S. Constitution or article I, § 12, of the Nebraska Constitution.

We note that in the *Van Ackeren* case the defendant renewed "all motions previously made" and that the judge who denied the pretrial motion was the same judge who conducted the trial. In the case at bar, the record does not show any such general motion. We further note that in the *Van Ackeren* case at 819, 265 N.W.2d at 678, we stated that it would be "prudent and skillful to interpose an objection when the evidence is offered . . . ."

In view of the fact that on occasion a defendant may want his statement to go to the jury when a portion of the statement may be exculpatory (see *State v. Cook*, 182 Neb. 684, 157 N.W.2d 151 (1968)); or when the statement puts much of the blame on others, as in this case; or for reasons unknown to the trial court; we hold that in a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal. Such a procedural rule obviates the necessity of the trial court's guessing whether defendant wants his statement before the jury and removes the possibility of defendant's second-guessing the admissibility of the evidence after an unfavorable result.

We note that a ruling in a pretrial hearing that a defendant's statement is admissible is not a final order that may be appealed from by a defendant. Neb. Rev. Stat. § 29-824 (Reissue 1985)

has been construed to make a lower court's ruling that such statements are not admissible appealable, as to the State, in an interim appeal. No such right is afforded a defendant under that statute, and an order denying a motion to suppress a defendant's statement is not an appealable order.

We have examined the record in also applying Neb. Evid. R. 103(4), which provides: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge." Our examination does not disclose any plain error. See *United States v. Vitale*, 728 F.2d 1090 (8th Cir. 1984).

With regard to defendant's second assignment of error, the record shows that a State's witness returned to the stand to correct a statement she had made in her earlier direct testimony. The witness had testified that she had never given any information to the police in other cases. After she left the stand and went into the hall outside the courtroom, one of the police officers remarked to her that she had given evidence to the police before, in another case. The witness then remembered that 7 years before she had given evidence to the police in "a child molesting case." The witness was recalled to the stand and corrected her testimony in that regard.

The police officer who furnished the correct information to the witness had completed his testimony in the trial, although he was called back by defendant to testify concerning this issue. The witness in question had completed her testimony. The terms of the witness sequestration order are not in the record, and we cannot say there was a violation of whatever order was issued.

In any event, there was clearly no prejudice to defendant. The incident gave defendant a chance to attack the credibility of one of the State's witnesses—a chance he might not otherwise have had. Where there is no prejudice shown to defendant, it is within the sound discretion of the trial court to allow testimony from a witness who is in violation of a sequestration order. *State v. Swillie*, 218 Neb. 551, 357 N.W.2d 212 (1984). The trial court did not abuse its discretion in this case.

The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF J.W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. R.J.W., APPELLANT.

402 N.W.2d 671

Filed March 13, 1987. No. 86-515.

1. **Parental Rights: Appeal and Error.** An order terminating parental rights is reviewed by this court de novo on the record on appeal.
2. **Juvenile Courts: Appeal and Error.** Where there is a dispute in the evidence, this court will give great weight to the juvenile court's findings because it heard and observed the parties and witnesses.
3. **Parental Rights.** A termination order must be supported by clear and convincing evidence and should only be issued as a last resort when no reasonable alternative can be said to exist.
4. _____. The primary consideration in termination proceedings is to reach a determination that serves the best interests of the child.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Mary K. Thielen of Taylor, Fabian, Thielen & Thielen, for appellant.

W. Russell Bowie of Ashford, Bowie & Higgins, P.C., guardian ad litem.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

R.J.W. has appealed from the order of the separate juvenile court of Douglas County, Nebraska, which terminated her parental rights to her son J.W.

J.W. was born out of wedlock to the appellant on July 9, 1984. By November of 1984, the 16-year-old appellant had determined that she was unable to properly provide for the 4-month-old J.W.'s needs. As a result, she contacted the Department of Social Services in order to voluntarily place her child in foster care. J.W. has remained in foster care since that time.

On November 28, 1984, a petition was filed alleging that J.W. and his brother, R.H.W., born September 16, 1982, were children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982), being under 18 years of age and homeless

or destitute or without proper support through no fault of their natural mother. According to the appellant, she herself was in foster care in 1982 when she had her first child, R.H.W.

At a December 11, 1984, detention hearing, the appellant did not contest the continued placement of J.W. with the Department of Social Services or of R.H.W. with his natural maternal grandmother, D.W., with whom he had lived since birth.

At the adjudication hearing held on January 31, 1985, the appellant stipulated to the allegations in the petition. The court found the facts in the petition sufficient to bring the children within the meaning of § 43-247(3)(a) and ordered that they be placed in the custody of the Department of Social Services. R.H.W. was ordered to continue to reside with his grandmother. The appellant was granted reasonable rights of visitation.

At a March 6, 1985, disposition hearing, there was evidence that the appellant had visited J.W. on only three occasions since his placement in foster care in November of 1984. There was also evidence that she had attempted suicide 1 month after J.W.'s placement. After reviewing the recommendations of the court service officer, guardian ad litem, and Child Protective Services (CPS) worker, the juvenile court entered an order requiring:

> 3. That [R.J.W.], mother, shall maintain regular visitation with [J.W.] as arranged by the Nebraska Department of Social Services.
>
> 4. That [R.J.W.] shall submit to a psychological and psychiatric evaluation and shall comply with all recommendations as a result of these evaluations; that the Court Service Officer shall make the arrangements.
>
> 5. That [R.J.W.] shall participate in parenting classes as arranged by the Court Service Officer.
>
> 6. That [R.J.W.] shall obtain and maintain adequate housing for herself and her children.
>
> 7. That [R.J.W.] shall cooperate with the workers involved and notify them within 72 hours of any change in residence.

Substantially similar orders were entered by the court following

review hearings on July 9, 1985, November 13, 1985, and March 12, 1986.

On March 17, 1986, a petition to terminate the appellant's parental rights to J.W. was filed. It alleged that J.W. was a child within the meaning of Neb. Rev. Stat. § 43-292(6) (Reissue 1984), because reasonable efforts, under the direction of the court, had failed to correct the conditions leading to the determination that J.W. was a child within the meaning of § 43-247(3)(a). Specifically, it alleged that the appellant had failed to comply with the court-ordered plan of rehabilitation by (1) visiting J.W. only 13 times in 15 months, (2) twice failing to keep scheduled appointments for psychiatric evaluations, (3) attending only one parenting class, (4) failing to obtain independent and stable housing, and (5) failing to maintain contact with her probation officers and to keep them informed of her situation and whereabouts. Following the presentation of evidence at a May 8, 1986, hearing, the court entered an order terminating the appellant's rights to J.W.

On appeal, the appellant maintains: (1) The evidence was not sufficient to support termination of her rights; (2) The court erred in finding it was in J.W.'s best interests to terminate R.J.W.'s parental rights; and (3) The order terminating her parental rights is contrary to law.

An order terminating parental rights is reviewed by this court de novo on the record on appeal. *In re Interest of J.S., S.C., and L.S., ante* p. 234, 397 N.W.2d 621 (1986). Where there is a dispute in the evidence, however, the reviewing court must give great weight to the juvenile court's findings because the trial court heard and observed the parties and witnesses. *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985). The termination order must be supported by clear and convincing evidence and should only be issued as a last resort when no reasonable alternative can be said to exist. *In re Interest of J.S., S.C., and L.S., supra.* Nevertheless, a primary consideration in termination proceedings is to reach a determination that serves the best interests of the child. *In re Interest of J.S., S.C., and L.S., supra.*

The appellant initially maintains that there was not clear and convincing evidence before the trial court to show that

reasonable efforts, under direction of the court, had failed to correct the conditions which led to the determination that J.W. was a child as described in § 43-247(3)(a).

By as early as the March 6, 1985, disposition hearing, the court service worker, CPS worker, guardian ad litem, and court all expressed concern over the appellant's failure to regularly visit J.W. The evidence indicates that although weekly visits were authorized, between his placement in November of 1984 and the March 6 hearing, the appellant visited J.W. on only three occasions. The appellant testified that visitation with J.W. was important to her but that transportation problems had made it difficult. At the court's request for his assessment of the situation, the deputy county attorney warned the appellant that if her performance did not improve, termination proceedings would be considered. The court then entered its order requiring the appellant, inter alia, to maintain regular visitation with J.W. as arranged by the Department of Social Services.

At the next hearing on July 9, 1985, the evidence showed that the appellant had visited J.W. again only two or three times in 4 months. The appellant, through her attorney, acknowledged the need to better comply with the order and was warned by the court to follow the order or face termination of her parental rights.

At the next review hearing, held on November 13, 1985, the appellant did not appear, and the evidence again showed that she had visited J.W. only twice since the previous hearing. No one at this hearing knew of her whereabouts. The court warned that if the appellant did not take action, her rights to J.W. would be terminated.

At the March 12, 1986, review hearing, the evidence was that the appellant had visited J.W. on only 6 of 14 opportunities since the November hearing. According to the court service officer and CPS worker, out of the 15 months J.W. had been in foster care, the appellant had visited him on only 13 occasions. The appellant, through her attorney, disputed that fact, claiming that she had visited J.W. on a more frequent basis.

The motion to terminate was filed on March 17, 1986, and the hearing on the motion was held on May 8, 1986. The CPS worker testified that the appellant had actually visited J.W. an

estimated 15 times in the 16 months he had worked on the case. He also stated that he had informed the appellant that transportation could be provided if that was ever a problem in visitation and that in fact, when she did visit, she usually came by means of transportation that he had arranged. The CPS worker also indicated that he had discussed with the appellant the importance of visiting her son, particularly following the November 1985 hearing.

There is evidence that the appellant made greater efforts to visit her son following the November hearing. On one such occasion, she missed a visitation when she showed up without previously arranging a visit. In late November she canceled a visit because she had just given birth to a third child. Following a December 10, 1985, visit, the appellant did not visit J.W. or contact the CPS worker for 3 weeks. She explained that she had been hospitalized for 2 weeks as the result of having been stabbed on December 13, 1985. After this 3-week hiatus from visitation, the CPS worker advised the appellant that he would not schedule any further visits until she had consulted with her attorney regarding the importance of her visits.

The appellant, eventually, did consult with her lawyer and the CPS worker confirmed that subsequent to that date, her pattern of visitation improved. From January 31 through March 4, 1986, she missed only one visit that was within her control to make.

Nevertheless, the CPS worker questioned why this improvement had occurred. On cross-examination by the guardian ad litem, the CPS worker estimated that only five of her many missed visitations over the 64 weeks that J.W. was in foster care could be attributed to circumstances beyond her control. He also acknowledged that in July of 1985, the appellant had exhibited a similar pattern of intense visitation for a very brief period of time, which was ultimately followed by several months with no visits at all.

The court-ordered rehabilitation plan also required the appellant to submit to both psychological and psychiatric evaluations. These evaluations were recommended by the team workers following her suicide attempt on December 15, 1984. A psychological evaluation was conducted on March 28, 1985, by

Peter Knolla, a psychologist. The appellant was found to be functioning in the retarded, borderline deficient level of intelligence; to be functionally illiterate; and to have a normal adolescent personality, with mental retardation and passive, acting-out, childlike defense impulses.

At the termination hearing, the court service officer testified that the appellant had missed scheduled psychiatric evaluations in April and August of 1985. The appellant explained that she had missed the first appointment due to illness and the second because she thought it was for "crazy folks." She testified that she promised to keep the appointment for a third evaluation when scheduled, but the arrangements were never made because the court service worker believed she would not attend.

The appellant's performance regarding the parenting classes required by the court's order was poor. She attended one class in June of 1985, dropped in on another class in February of 1986, and finally, after the filing of the petition to terminate, enrolled in classes on April 9, 1986. She had attended two parenting classes subsequent to April 9 and two others had been canceled by the instructor. The instructor did not know whether she could assist the appellant in improving her parenting skills in the future because the instructor was unsure whether the appellant would follow through with the course.

The rehabilitation plan also required the appellant to obtain and maintain adequate housing for herself and her children. The court service worker testified that appellant had not complied because she failed to obtain an independent or stable place of residence. Further testimony showed the appellant had lived in five or six different residences since the case began and at the time of the termination hearing was residing in a house with her mother's boyfriend. The appellant indicated that she sometimes lives with her mother at another Omaha residence.

The final requirement of the rehabilitation plan was that the appellant cooperate with the workers and notify them of any change of residence within 72 hours. The court service worker testified she was not informed on a regular basis of the appellant's moves and on occasion did not know how to reach her. The appellant admitted she only contacted the court service worker "every now and then," but indicated that she had

informed the CPS worker of her most recent move. The evidence indicates that frequently both the court service and CPS workers had to track her down.

The juvenile court was not required to implement a plan of rehabilitation. *In re Interest of M.B., R.P., and J.P.*, 222 Neb. 757, 386 N.W.2d 877 (1986). But failure to comply with such a plan, where the court has ordered a parent to make reasonable efforts to rehabilitate, presents an independent reason justifying termination of parental rights. *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985).

The evidence in the present case is both clear and convincing in showing the appellant's noncompliance with the plan. Her visits were sporadic at best, and there were long periods of time where she did not visit J.W. at all. She missed two opportunities for a psychiatric evaluation, and her only excuses for missing the later one were that it was for crazy people and she thought it unimportant. The appellant's explanation for her poor showing on the parenting classes was that they made her uncomfortable.

Improvements in the appellant's visitation just prior to the filing of the petition and her attendance at parenting classes following the filing are unimpressive. As this court noted in *In re Interest of D.*, 218 Neb. 23, 28, 352 N.W.2d 566, 570 (1984):

> As all too frequently occurs in cases such as the one before us, the enthusiasm or receptivity of a parent toward a rehabilitation program seems to intensify as the time for a dispositional hearing approaches. A practical program of parental rehabilitation should not be viewed as our system's indulgent toleration of an otherwise intolerable situation. A parent afforded a program of rehabilitation must realize that the courts will examine a pattern of parental conduct in determining an appropriate disposition for the best interests of the child. In cases such as this the past is an indication of the future.

The appellant's brief period of improved compliance just prior to and after the filing of the motion to terminate is similar to the pattern she exhibited in July of 1985, which was ultimately followed by over 3 months of not seeing the child. The evidence here was sufficient to terminate R.J.W.'s parental rights.

Further, we must agree that it was in J.W.'s best interests to

terminate R.J.W.'s parental rights. This court has frequently held that where a parent fails to rehabilitate herself within a reasonable time, the best interests of the child require that a final disposition be made without delay. See *In re Interest of A.L.N.*, 223 Neb. 675, 392 N.W.2d 780 (1986). Temporary custody situations are attendant with many problems and a child cannot, and should not, be left suspended in foster care, nor be made to await uncertain parental maturity. *In re Interest of D., supra.*

In the present case J.W. was 22 months old at the time of the termination hearing and had been in foster care since the age of 4 months. The appellant was 17 years of age at the time of the hearing. The record shows she has two other children, is unemployed, lives on social security benefits, has a ninth-grade education, and has a borderline deficient level of intelligence.

The above are not the reasons why the appellant's parental rights were terminated. Instead, it was her failure over a period of 16 months to cooperate with and take advantage of the court's and support workers' efforts and services, as well as her failure to visit J.W. The evidence shows that the infrequency of her visits resulted in J.W.'s being uncomfortable when visits did occur. When the frequency of the appellant's visits increased, J.W. became more comfortable, but that may have been due in part to the fact that R.J.W. was accompanied by other children.

> Parental inability to reach heights of economic success is no basis to sever the precious relationship which normally exists between parent and child. However, the same system of laws pertaining to juveniles cannot reward parental bankruptcy evidenced by indifference or inexcusable lethargy adversely affecting the life and living conditions demanded by a child's personal dignity.

In re Interest of D., supra at 29, 352 N.W.2d at 570. J.W. has spent over three-quarters of his life in foster care. After his first 4 months, his mother has been a part of that life for only approximately 15 to 16 hours. The claim that termination of the appellant's parental rights was not in J.W.'s best interests is without merit.

Finally, the appellant contends the termination was contrary to law because the record failed to establish by clear and

convincing evidence that termination was the only reasonable alternative remaining.

In the recent case of *In re Interest of M.B., R.P., and J.P.*, 222 Neb. 757, 386 N.W.2d 877 (1986), we held that the primary consideration in termination proceedings is the best interests of the child. While termination should be considered a last resort, § 43-292 requires that the best interests of the child and evidence of fault or neglect be considered together in reaching such a determination. *In re Interest of M.B., R.P., and J.P., supra.*

The record establishes that termination of the appellant's parental rights to J.W. was not contrary to law. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN V. PAINTER, APPELLANT.
402 N.W.2d 677

Filed March 13, 1987. No. 86-600.

1. **Verdicts: Appeal and Error.** A guilty verdict will not be reversed by this court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law.
2. _____: _____. After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if the evidence sustains some rational theory of guilt.
3. **Appeal and Error.** In disposing of an appeal the Supreme Court considers only those errors which are properly assigned and presented to this court.
4. **Courts: Appeal and Error.** Where a cause has been appealed to the Supreme Court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to this court.
5. _____: _____. Looking at the role of the district court in appeals from county court, it is clear that the district court is considered to be an intermediate court of appeals and not a trial court.
6. _____: _____. Just as the Supreme Court may, on a motion for rehearing, timely modify its opinion, an intermediate appellate court may also timely modify its opinion.

7. **Criminal Law: Statutes: Sentences.** Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed as modified.

Richard J. Epstein, for appellant.

Robert M. Spire, Attorney General, and Janie C. Castaneda, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

The appellant, John V. Painter, was charged in the county court for Sarpy County, Nebraska, with driving while intoxicated in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984) and with refusing to submit to a chemical test in violation of Neb. Rev. Stat. § 39-669.08 (Reissue 1984). Following trial to a jury, Painter was convicted of both charges. Thereafter, the conviction for driving while intoxicated was enhanced to a third offense by reason of two previous convictions for driving while intoxicated. A presentence investigation report was ordered and received. On the charge of driving while intoxicated, Painter was sentenced to pay a fine of $500 and serve 6 months in jail, and he had his driver's license revoked for life. On the charge of refusing to submit to a chemical test, Painter was sentenced to pay a fine of $200 and serve 7 days in jail, and he had his license suspended for a period of 6 months. The county court further ordered that the jail sentences were to be served consecutively and the license suspensions were to run concurrently.

Painter appealed to the district court for Sarpy County, Nebraska. On appeal to the district court the convictions were affirmed. On July 11, 1986, the district court filed an opinion and order, which read in part as follows:

> The County Court decision should be affirmed in all respects, *identical sentences imposed* in this Court, and costs in both courts taxed to the defendant-appellant.

> IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED the convictions and sentences imposed by the County Court are affirmed.
>
> IT IS FURTHER ORDERED the defendant be, and hereby is, sentenced and committed to the County Jail for six (6) months on Count I and for seven (7) days on Count II, said sentences to be served *concurrently* . . . .

(Emphasis supplied.)

Thereafter, on July 14, 1986, the district court, apparently recognizing that its order of July 11 was internally inconsistent in that the judgment of the county court had ordered the jail sentences to be served consecutively and not concurrently, filed a document entitled "NUNC PRO TUNC ORDER." The order reads in part:

> This matter comes on for hearing on the Court's own motion to correct the Opinion and Order signed and entered July 11, 1986. The Court, being fully advised in the premises, finds the sentences to confinement imposed by the County Court were to be served consecutively rather than concurrently, and the Court finds since there was no abuse of discretion on the part of the County Court in imposing the sentences, that that portion of the Opinion and Order affirming the convictions and sentences requiring the sentences to be served concurrently was erroneous.

The order then provides that the sentences are to be served consecutively rather than concurrently.

It is from these orders that Painter now appeals to this court, alleging as error that the evidence was insufficient to convict Painter of the driving while intoxicated charge and that he received ineffective assistance of counsel in the county court. He also claims that the district court should have modified the sentence regarding the suspension of Painter's license from a lifetime suspension to a suspension for 15 years and should not have entered an order nunc pro tunc once the sentence had been announced by the district court. We believe that the judgment and sentences ultimately imposed by the district court should be affirmed as modified herein.

A brief recitation of the facts is necessary to address at least

two of the assignments of error. The record discloses that on March 8, 1985, officers went to the scene of a personal injury accident. Painter had collided with a parked automobile while driving along a straight road seven to eight blocks from his home. The front end of his Volkswagen and the rear of the other vehicle were both severely damaged.

The first officer to arrive at the scene detected the odor of alcohol on and about Painter. Painter told the officer that he had consumed seven beers that evening. When the officer asked Painter to perform field sobriety tests, Painter began complaining about his legs. The officer testified that Painter was belligerent and that his speech was slow and slurred.

At the trial the officer, after testifying to appropriate foundation, including the fact that he had seen persons who were intoxicated, testified that in his opinion Painter was intoxicated to the point that it impaired his driving ability.

A second officer who had been at the scene also testified. His testimony was to the effect that following the accident Painter was taken to the hospital for treatment of injuries. The second officer said that, after first going to the police station to obtain appropriate forms for Painter's consent to submit to appropriate body fluid tests, he also went to the hospital. When he arrived, the officer testified, he detected the smell of alcohol on Painter. He testified that Painter was red in the face and that his eyes were bloodshot and watery. The officer testified that he read Painter the implied consent form and placed him under arrest. At that point Painter became violent and refused treatment from the nurses. Painter refused to submit to a blood test, citing religious reasons. He was unable to provide a urine sample. The officer testified that he later observed Painter crying. After testifying to appropriate foundation, the second officer also testified that in his opinion Painter was sufficiently under the influence of alcohol to impair his driving ability.

A third witness for the State was one of the paramedics who was called to the scene of the accident. He testified that Painter was belligerent, that he smelled of alcohol, that his eyes were bloodshot and his pupils sluggish, that his skin was sweaty, that his pulse was a little rapid, and that his blood pressure was normal and respiration a little fast, even though, under normal

conditions following an accident, his blood pressure should have been elevated. He testified that, based upon his knowledge and experience, the signs which he observed in Painter at the scene of the accident were consistent with the effects of alcohol.

Painter then called a research scientist and medical educator affiliated with Creighton University. He testified that the signs displayed by Painter were more indicative of trauma to the head rather than due to alcohol.

Turning to the contentions that the evidence was either insufficient or that Painter received ineffective assistance of counsel, we believe that the record in this case simply does not support Painter's claims. What we had in this case was a traditional conflict in the evidence. If the triers of fact believed the police officers and the paramedic, they could have reasonably concluded that Painter was operating his motor vehicle under the influence of alcohol and refused to take the required test. On the other hand, if they believed Painter's expert witness, they could find that his behavior was due to the trauma. After hearing all of the evidence, they obviously chose to believe the officers and the paramedic and to give little weight to the testimony of Painter's expert. That does not amount to error nor entitle this court to set aside the verdict. As we have frequently said: "A guilty verdict will not be reversed by this court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law." *State v. Taylor*, 221 Neb. 114, 119, 375 N.W.2d 610, 614 (1985). See, also, *State v. Warnke*, 221 Neb. 625, 380 N.W.2d 241 (1986). In a similar case, *State v. Borchardt, ante* p. 47, 59, 395 N.W.2d 551, 559-60 (1986), we said:

> It . . . is a well-established axiom that in resolving a challenge to the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such is for the trier of fact and must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. [Citations omitted.] Stated more simply, it is not for this court to accept one version of a case over another; that is for the jury. [Citation omitted.]

> Moreover, it is well established that after a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if the evidence sustains some rational theory of guilt. [Citation omitted.]

See, also, *State v. Baker, ante* p. 130, 395 N.W.2d 766 (1986); *State v. Halligan,* 222 Neb. 866, 387 N.W.2d 698 (1986); *State v. Blattner,* 222 Neb. 396, 383 N.W.2d 803 (1986). This record certainly would not support a claim that the evidence was insufficient as a matter of law.

While Painter suggests that the only evidence establishing his guilt was testimony that there was a smell of alcohol on his person, a reading of the record discloses that there was much more. To begin with, there was an unexplained accident with a parked car. Additionally, there was the testimony that there was the smell of alcohol on his person, that Painter conceded that he had consumed seven beers that evening, that his eyes were sluggish and bloodshot, that his speech was slow and slurred, and that he behaved in a belligerent manner. All of these are signs consistent with an individual who is operating under the influence of alcohol. The assignment must simply be overruled.

The claim that Painter received ineffective assistance of counsel must also be overruled. While the evidence does not disclose that Painter's counsel was ineffective and, quite to the contrary, discloses that he was as effective as one could be under the circumstances, we do not reach that question. We do not do so simply because the issue was not raised in the district court, even though counsel for Painter in the district court was not the same as counsel for Painter in the county court. That is to say, Painter did not raise the issue of ineffective assistance of counsel at the first opportunity. Painter simply did not present to the district court any contention regarding this alleged ineffective assistance of counsel, and raises the issue for the first time on appeal to this court. As we noted in *Haeffner v. State,* 220 Neb. 560, 564, 371 N.W.2d 658, 661 (1985):

> In disposing of an appeal the Supreme Court considers only those errors which are properly assigned and presented to this court. [Citation omitted.] Where a cause has been appealed to the Supreme Court from a district

> court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to this court. In the absence of plain error, where an issue is raised for the first time in the Supreme Court, it will be disregarded inasmuch as the district court cannot commit error in resolving an issue never presented and submitted for disposition.[Citation omitted.]

Painter had an opportunity to raise that issue on appeal to the district court with new counsel and chose not to do so. We may, therefore, simply disregard that assignment.

That brings us, then, to the question of whether the district court is precluded from correcting its order and directing that the jail sentences be served consecutively rather than concurrently.

In support of his position that once the district court announces a sentence it cannot thereafter be modified, Painter cites to us the case of *State v. Cousins*, 208 Neb. 245, 302 N.W.2d 731 (1981), wherein we held that the district court may not change a sentence from concurrent to consecutive on its own motion by use of a nunc pro tunc order. While the holding of *Cousins* is correct, and a sentence validly imposed by a sentencing court takes effect from the time it is pronounced so that any subsequent sentence fixing a different term is a nullity, it has no application to the instant case. In *Cousins,* the district court was the *sentencing* court, while in this case the district court was an *appellate* court reviewing a sentence earlier imposed by the county court. That difference is significant.

Neb. Rev. Stat. § 29-613 (Reissue 1985) provides: "The district court shall hear and determine any cause brought by appeal from a county court . . . upon the record and may affirm, modify, or vacate the judgment or may remand the case to the county court for a new trial." It is clear that the district court is not sitting as the original court but, rather, as the appellate court.

As we recently noted in *State v. Daniels, ante* p. 264, 266, 397 N.W.2d 631, 633 (1986):

> Looking at the role of the district court in appeals from county court, it is clear that the district court is considered

> to be an intermediate court of appeals and not a trial court. *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984); *State v. Ledingham*, 217 Neb. 135, 347 N.W.2d 865 (1984).

See, also, *State v. Thompson, post* p. 922, 402 N.W.2d 271 (1987).

The significance of this is that, just as the Supreme Court may, on a motion for rehearing, timely modify its opinion, an intermediate appellate court may also timely modify its opinion. We believe the district court was in error in designating its order as a "nunc pro tunc order," in that the purpose of a nunc pro tunc order is to make the record reflect what in fact occurred and was erroneously recorded, and not to cause an order or judgment that was never made or rendered to be placed upon the record of the court. See *State v. Al-Hafeez,* 208 Neb. 681, 305 N.W.2d 379 (1981). In the instant case, the error was not committed by the scrivener, but was caused by a misstatement made by the judge. What the court entitles the order, however, is not controlling. One need only read the judgment and order entered by the district court on July 11 to recognize that what in fact the district court, sitting as an intermediate appellate court, intended to do was to impose the identical sentence which had been imposed by the county court and which admittedly provided that the jail sentences were to be served consecutively. In fact, had the district court ended its decision several paragraphs earlier, where it provided that "[t]he County Court decision should be affirmed in all respects, identical sentences imposed in this Court, and costs in both courts taxed to the defendant-appellant," no issue would be raised. It is only by reason of the fact that the court sought to expand its decision and included the word "concurrently" when referring to the jail sentences that any problem was created. There was simply no error in the district court's modifying its earlier order and eliminating the internal inconsistency which existed.

That leaves us, then, with the final question of whether the district court should have reduced the sentence. At the time that Painter was initially sentenced, the provisions of § 39-669.07 provided that upon conviction one's privileges to operate a

motor vehicle should be suspended for life. While the case was still on appeal to the district court, the Legislature amended the statute to provide that the suspension should be for a period of 15 years and not for life. In *State v. Randolph,* 186 Neb. 297, 301-02, 183 N.W.2d 225, 228 (1971), we said:

> While there is still some divergence of opinion among the states, we believe the better rule to be and we therefore hold that where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.

We then held in *State v. Randolph, supra,* that the sentences should be reduced to reflect the amended statute.

We likewise believe that where, as here, the matter is still pending before a court and, to that extent, has not become final and binding, the court should reduce the sentence to reflect the amendatory act. See *State v. Thompson, supra.* For that reason we believe that that portion of the sentence which suspended Painter's license for life on the conviction for driving while under the influence of alcohol should be vacated, and in lieu thereof Painter's privilege to operate a motor vehicle should be suspended for a period of 15 years.

In all other respects the judgment and orders of the district court affirming the convictions and order of the county court should be affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. BRUCE W. ROGGENKAMP, APPELLANT.

402 N.W.2d 682

Filed March 13, 1987. No. 86-648.

1. **Arrests: Police Officers and Sheriffs: Probable Cause.** The lawfulness of an arrest without a warrant must be based on probable cause, which exists where the facts and circumstances within an officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed.
2. _____: _____: _____. If the facts available to the officer at the time of the arrest would warrant a person of reasonable caution in the belief the action was appropriate, then probable cause exists.
3. **Rules of Evidence: Trial: Appeal and Error.** Error may not be predicated on a ruling which admits evidence unless a substantial right of a party is affected and a timely objection appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context. Neb. Evid. R. 103(1)(a) (Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1985)).
4. **Trial: Evidence: Appeal and Error.** If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error.
5. **Trial: Evidence: Pretrial Procedure: Appeal and Error.** In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress evidence, the defendant must object at trial to admission of the evidence which was the subject of the motion to suppress in order to preserve a question concerning admissibility of that evidence for review on appeal.
6. **Trial: Evidence: Stipulations: Appeal and Error.** A party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with such stipulation.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

John D. Rouse and Jerry Soucie, for appellant.

Robert M. Spire, Attorney General, and Elaine A. Catlin, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

In a bench trial in the county court for Lancaster County Bruce W. Roggenkamp was convicted of drunk driving, that is, operating a motor vehicle while under the influence of alcoholic

liquor or while Roggenkamp had ten-hundredths of 1 percent by weight of alcohol in his body fluid, a violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984). Roggenkamp appealed to the district court for Lancaster County, which affirmed the judgment of the county court. We affirm.

At 1:45 a.m. on March 24, 1985, Deputy Gordon Harrod of the Lancaster County Sheriff's Department was northbound in his cruiser on Southwest 84th Street near Lincoln. Deputy Harrod observed a southbound vehicle approaching at a speed of 30 miles per hour on Southwest 84th Street, a two-lane public highway with a blacktop surface and a 55-m.p.h. speed limit. A yellow centerline divided the driving lanes of the highway, and white lines marked the edges of the surface.

After the oncoming car had passed the cruiser, Deputy Harrod observed the southbound vehicle in the cruiser's rearview mirror. Deputy Harrod saw the other vehicle move to the shoulder on the west side of the road, then "cross into the center" of the highway, and again move back toward the west edge of the road. Harrod turned his cruiser around, followed the southbound vehicle, a Chevrolet Vega, for some distance, and saw that automobile straddle the centerline on the road. Harrod also observed the other car "drop off — completely off the roadway with about half [the] vehicle on the right shoulder — the right side of [the] vehicle on the southbound lane on the shoulder and pull back out of the shoulder and cross the center lane with about half of [the] vehicle also southbound." Approximately 200 yards north of the private driveway from the highway to the Roggenkamp residence, Deputy Harrod activated the cruiser's revolving red lights. When the Vega turned into the driveway, Harrod followed as the driveway led to the Roggenkamp house.

The Vega stopped about 20 feet from the house. After Deputy Harrod stopped his cruiser behind the Vega and was getting out of the cruiser, the male driver of the Vega got out of his car. When Harrod walked up to the driver, later identified as Bruce Roggenkamp, Harrod told Roggenkamp about the deputy's observations of Roggenkamp's erratic driving. At that point Harrod detected the "odor of alcohol" from Roggenkamp. Through illumination from the deputy's

flashlight, Harrod saw Roggenkamp's bloodshot eyes. Roggenkamp is 6 feet tall and weighs 220 pounds. Deputy Harrod requested inspection of the driver's license of Roggenkamp and his vehicle registration. Roggenkamp responded: "I'm not interested. Good night." When Roggenkamp started to leave and walk toward his house, Deputy Harrod told Roggenkamp he would be arrested if he tried to leave. Roggenkamp's reply was "Now, good night. I'll see you some other time." Throughout this time Bruce Roggenkamp's wife, Cynthia, who is 5 feet 7 inches tall and weighs 230 pounds, was standing nearby, at the front of the Roggenkamp car.

As Bruce Roggenkamp was walking toward his house, Harrod stepped between Roggenkamp and the house, informing Roggenkamp that he was being placed under arrest. In Deputy Harrod's description of ensuing events, Cynthia Roggenkamp "came at me at a fairly high rate of speed," grabbed the officer, and "pulled, pushed, knocked me down to my knees when I was trying to keep Mr. Roggenkamp from leaving." Harrod "advised [Cynthia Roggenkamp] that she would have to leave me alone or I would place her under arrest." In the course of his contact with Cynthia Roggenkamp, Harrod detected the "odor of alcohol" on her breath but did not observe anything about her eyes. Bruce Roggenkamp, who had walked up some stairs to the front door of his house, returned to the bottom of the steps and joined the struggle between Cynthia Roggenkamp and Deputy Harrod. According to Harrod,

> At that time [Cynthia Roggenkamp] got back up. She was struggling with me. And shortly after she rejoined I believe [Bruce Roggenkamp] disengaged and went back upstairs. While he attempted to disengage, I was able to get away from her and shortly after that is when I tried to handcuff him initially.

Harrod arrested Bruce Roggenkamp and, during a momentary lull in the action, "got on my radio — my portable radio and advised [the sheriff's dispatcher] that I needed assistance. . . . [T]hey [Roggenkamps] weren't gonna quit. . . . I was fighting with a couple of real large people."

Roggenkamps ran up the stairs and into their house. Harrod pursued and placed his foot in the doorway, when Roggenkamps slammed the door, trapping Harrod's foot. "They smashed my foot," Harrod testified, causing "a great deal of pain." In an attempt to extricate his foot, Harrod thrust his PR 24, an aluminum nightstick, into the opening of the door. While Harrod was using his nightstick to pry open the door, he could hear "grunting" on the other side of the door as Roggenkamps pushed against that door. Harrod "could tell that they were right there so I just tried to keep my stick in the door." At this time someone, just inside the door, was "stomping" on Harrod's foot. Also, someone inside pulled on Harrod's nightstick,

> trying to scramble to get the — the stick. So while I was trying to pull on the stick and the door was — the pressure on the door was released, I was able to pull my foot back out. And then as I was pulling on the stick they reversed their efforts and pushed the stick, which resulted in the door being closed.

Through a window in the door, Deputy Harrod saw Bruce Roggenkamp depart from the door area and walk down a hallway in the house. Believing that Bruce Roggenkamp might "drink some alcohol that would adversely affect . . . an intoxilyzer" or that Roggenkamp might "get something like a shotgun and blow me off the porch," Deputy Harrod threw his weight against the door, breaking the doorjamb and gaining entry.

Later, an Intoxilyzer test was administered to Bruce Roggenkamp and produced a "digital reading" of ".163% w/v." Pursuant to Neb. Rev. Stat. § 29-824 (Reissue 1985), Bruce Roggenkamp filed a motion to suppress the results of the Intoxilyzer test. That motion was denied by the county court on July 18, 1985. Roggenkamp's case was tried to the county court on October 3 in a "Trial by Stipulation." For the purpose of that trial, the deputy county attorney and Roggenkamp's lawyer stipulated in open court:

> Your Honor, this matter was set for stipulated trial at this time. The parties are in agreement that Exhibits 1 through 5 may be received by the Court. We further stipulate that

> Deputy Harrod, the officer involved in the case, gave Mr. Roggenkamp an intoxilyzer test on March 24th, 1985 and that he followed the procedures that are listed in Rule — Title 177 of the Department of Health Rules and Regulations; that he followed the checklist technique using the Intoxilyzer 4011AS, Serial Number 102316. He followed the checklist technique in the sequence, which is on the sheet. He checked the maintenance performed by Pam Zilly, the maintenance officer, and verified that the maintenance, repair and calibration had been performed for that particular intoxilyzer and that everything was okay with the machine; that he performed the test; a good sample was given; there were no problems with the machine; and the result of the intoxilyzer test was .163 percent weight per volume blood alcohol content. This all occurred in Lancaster County, Nebraska; and also that he is a permit holder, having a Class B permit as required by the Rules.

Upon specific inquiry from the court, Roggenkamp's lawyer acknowledged that the stipulation covered venue, Roggenkamp's driving a motor vehicle on a "public street," and the "chemical test." Regarding the stipulation, exhibits 1 and 2 are transcriptions of testimony given at the hearing on Roggenkamp's motion to suppress, containing the description of events at the Roggenkamp residence, as previously stated in this opinion. Exhibit 5 is a written report containing the result of the test administered to Roggenkamp by an "Intoxilyzer Model 4011AS," and reflected the Intoxilyzer's digital reading of ".163% w/v" concerning the sample of Roggenkamp's breath given for such testing. Pursuant to the stipulation by counsel, the court stated: "Exhibits 1 through 5, inclusive are offered and received. Thank you." Thereafter, the court found Roggenkamp guilty of drunk driving and imposed sentence on Roggenkamp. On appeal, the district court for Lancaster County affirmed the county court's judgment.

Roggenkamp lists nine assignments of error, but those may be distilled into two. First, Roggenkamp claims there was no probable cause for Harrod's arrest of Roggenkamp. Second, Roggenkamp contends the Intoxilyzer test result was

inadmissible because such test resulted from an illegal search or seizure in violation of Roggenkamp's constitutional guarantees against such action.

Neb. Rev. Stat. § 29-404.02 (Reissue 1985) provides in part:

> A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed:
>
> . . . .
>
> (2) A misdemeanor, and the officer has reasonable cause to believe that such person . . . (d) has committed a misdemeanor in the presence of the officer.

The lawfulness of an arrest without a warrant must be based on probable cause, which exists where "facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed." *State v. Harrison*, 218 Neb. 532, 535, 357 N.W.2d 201, 204 (1984). See, also, *Ker v. California*, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963). "If the facts available to the officer at the time of the arrest would warrant a man of reasonable caution in the belief the action was appropriate, then probable cause exists." *State v. Hack and Callans*, 212 Neb. 406, 408, 322 N.W.2d 806, 808 (1982). Thus, the key to a lawful arrest without a warrant is reasonable or probable cause that a person has committed a crime.

There is no doubt that Deputy Harrod had probable cause to arrest Roggenkamp for drunk driving. Deputy Harrod saw the erratic operation of Roggenkamp's automobile on a public highway. Harrod, within moments of observing Roggenkamp's display of driving, detected the odor of an alcoholic beverage, as such odor emanated from Roggenkamp, and saw Roggenkamp's bloodshot eyes. Because Deputy Harrod's attention was rather dramatically diverted from continuous observation of Bruce Roggenkamp, apparently the deputy did not notice the manner of Bruce Roggenkamp's walking. However, the Roggenkamp tag team effort is a circumstance which may be considered. Events outside the Roggenkamp house supplied an adequate basis for probable cause under the circumstances. Because Bruce Roggenkamp was arrested on

probable cause outside his home, an arrest warrant was unnecessary. See, *State v. Harrison, supra; United States v. Santana*, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976). Beyond our inquiry whether there was probable cause to arrest Bruce Roggenkamp for drunk driving, we neither evaluate nor comment further on the events which occurred at the Roggenkamp residence. Roggenkamp's first assignment of error has no merit.

That brings us to Roggenkamp's second assignment of error, a question concerning admission of evidence in the form of the Intoxilyzer test result. As reflected in the briefs filed in this case, the attorneys have done considerable research regarding constitutional considerations involved in searches and seizures. However, there is another fundamental consideration. Where is Roggenkamp's objection to admission of the Intoxilyzer test result as evidence at his trial? Not only was there no objection to admitting the test result as evidence, there was a stipulation for admission of that test result.

Considering first the absence of an objection, McCormick on Evidence § 52 at 126 (E. Cleary 3d ed. 1984) expresses a reason for necessity of an objection at trial:

> If the administration of the exclusionary rules of evidence is to be fair and workable the judge must be informed promptly of contentions that evidence should be rejected, and the reasons therefor. The initiative is placed on the party, not on the judge. The general approach, accordingly, is that a failure to object to an offer of evidence at the time the offer is made, assigning the grounds, is a waiver on appeal of any ground of complaint against its admission.

As dictated by the Nebraska Evidence Rules, error may not be predicated on a ruling which admits evidence unless a substantial right of a party is affected and a timely objection appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context. Neb. Evid. R. 103(1)(a) (Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1985)). "If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error." *State v. Archbold*, 217 Neb. 345, 352, 350 N.W.2d 500, 505 (1984).

Today, in *State v. Pointer, ante* p. 892, 402 N.W.2d 268 (1987), we reviewed a situation involving a defendant's failure to object to evidence admitted at trial after a court had overruled the defendant's motion to suppress the same evidence. In *Pointer,* we stated at 895, 402 N.W.2d at 271: "[I]n a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal." The principle enunciated in *Pointer, supra*, is equally applicable to the Intoxilyzer test result in Roggenkamp's case.

If a waiver includes a voluntary relinquishment of a known right, a classic illustration of waiver is found in the present case. While Roggenkamp protests use of the Intoxilyzer test result as evidence against him, his situation is similar to that of an individual who invites another to throw a rock at him and, when struck, complains that the rock was thrown too hard. There is a legal maxim expressed in Latin—Volenti non fit injuria. Few care about Latin anymore, but the principle expressed in that language is noteworthy: One who consents cannot receive an injury. Therefore, we hold that a party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with such stipulation. See *American Oil Co. v. City of Omaha*, 182 Neb. 532, 155 N.W.2d 805 (1968) (eminent domain proceedings; condemner's stipulation that condemnee had suffered a decrease in business during years pertinent to the condemnation proceedings; condemner cannot complain about stipulated evidence).

We conclude that there is no error in the judgment of the district court. Consequently, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS B. THOMPSON, ALSO KNOWN AS EARL ALAN THOMPSON, APPELLANT.

402 N.W.2d 271

Filed March 13, 1987. No. 86-677.

1. **Prior Convictions: Right to Counsel: Proof.** The State's burden in proving valid prior convictions for enhancement purposes is only to show that defendant had or knowingly and voluntarily waived counsel at the time of such convictions.
2. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case to the district court, the latter acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or an abuse of discretion.
3. **Courts: Sentences: Appeal and Error.** The State has the right to appeal a district court modification of a sentence imposed by a county court.
4. **Criminal Law: Statutes: Sentences.** In the absence of a specific contrary legislative mandate, where a criminal statute, after the commission of a prohibited act but before final judgment, is amended by mitigating the punishment, the punishment is that provided by the amendatory act.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Alan G. Stoler, for appellant.

Herbert M. Fitle, Omaha City Attorney, and Gary P. Bucchino, Omaha City Prosecutor, Richard M. Jones, and David F. Smalheiser, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

Following a county court bench trial, defendant, Thomas B. Thompson, also known as Earl Alan Thompson, was adjudged guilty of giving false information in violation of an ordinance of the city of Omaha and of driving while under the influence of alcohol, third offense, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984). On appeal the district court affirmed each conviction, but reduced the drunk driving sentence. While defendant has appealed both convictions to this court, his assignments of error relate solely to the drunk driving conviction and are that the district court (1) erred in failing to find error appearing on the record, in that the county court erred in admitting in evidence at the enhancement phase

of the trial a record concerning a prior drunk driving conviction, and (2) abused its discretion by imposing an excessive sentence. We affirm.

When the defendant was arrested for drunk driving on December 5, 1985, he told the police officers that his name was "Thomas B. Thompson," born August 17, 1951, and produced a driver's license under that name. On December 20, 1985, defendant was arraigned for drunk driving, first offense, as "Thomas B. Thompson." He entered a plea of no contest, and the matter was referred to the probation office for a presentence report.

That office discovered that "Thomas B. Thompson" was an alias used by Earl Alan Thompson, who had twice before been placed on probation for driving while drunk. A fingerprint analysis of "Thomas B. Thompson" and Earl Alan Thompson confirmed that these separate identities belonged to one and the same person. Moreover, defendant conceded in open court that Earl is his real given name.

The county court then allowed the State to amend its complaint to show that Earl Alan Thompson and the person originally charged were the same and, as such, to allege two prior drunk driving convictions. That changed the charge from driving while intoxicated, first offense, to driving while intoxicated, third offense. The trial court permitted defendant to withdraw the plea he had entered as Thomas B. Thompson so that he could be arraigned on the amended complaint as Earl Alan Thompson. Defendant then pled no contest to the new charge.

At the enhancement phase of the proceeding, the State introduced certified copies of two prior driving while intoxicated convictions. The first was dated September 12, 1983, and showed that defendant was represented by counsel. The second was dated February 8, 1985, and showed it was for driving while intoxicated, second offense, and that defendant was advised of his right to counsel and waived that right. Both of the certified copies of convictions were received into evidence. The county court then, on January 29, 1986, found defendant guilty of driving while intoxicated, third offense, and imposed a sentence which revoked defendant's driver's license

for life and required him to spend 180 days in jail and pay a $500 fine.

In connection with the first assignment of error, defendant argues the county court erred in receiving in evidence the record of the conviction for second offense drunk driving, for the reason that although the record recited that he had been advised of his right to counsel and had waived that right, such waiver could not be valid because the record does not show that counsel was present, that defendant was advised that the charges and penalties of the conviction were enhanced to second offense, that he had a right to an enhancement hearing to determine the validity of an earlier offense, and that said earlier offense could be used for enhancement purposes.

The claim that the questioned record is somehow deficient because it does not show counsel was present is frivolous; counsel obviously need not be present if the right to counsel has been validly waived. The certified record in question consists of a checklist signed by the trial judge, which reflects that defendant was advised of his right to counsel and waived that right. The checklist imports verity and supports the conclusion that defendant knowingly and voluntarily waived counsel and, thus, satisfies the State's burden in proving the conviction in question as a valid one for enhancement purposes under the provisions of § 39-669.07(3). See, *State v. Foster, ante* p. 267, 398 N.W.2d 101 (1986); *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984). There is therefore no merit to defendant's first assignment of error.

The district court, on July 22, 1986, reduced the jail time imposed by the county court to 120 days and the period of license revocation to 15 years. The jail time imposed by the district court is within the limits set by Neb. Rev. Stat. §§ 28-106 and 39-669.07(3) (Cum. Supp. 1986), as was the greater jail time imposed by the county court. Yet the defendant has the effrontery to argue that the sentence as reduced by the district court is excessive. Such a claim from one who has not only demonstrated he has not learned from his past experiences but who lied about his identity in order that he might escape the consequences of his past acts can only be described as preposterous!

The State correctly argues that in an appeal of a criminal case to the district court, the latter acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or an abuse of discretion. *State v. Painter, ante* p. 905, 402 N.W.2d 677 (1987); *State v. Daniels, ante* p. 264, 397 N.W.2d 631 (1986); *State v. Lynch,* 223 Neb. 849, 394 N.W.2d 651 (1986); Neb. Rev. Stat. § 24-541.06 (Reissue 1985). There was no sentencing error or abuse of discretion shown by the county court record; the district court therefore erred in reducing the jail time imposed by the county court. Since the district court was acting as a reviewing rather than as a sentencing court, the State had the right to cross-appeal from that erroneous ruling. However, it elected not to do so, and we therefore do not disturb the district court's reduction of the jail time imposed by the county court. (Neb. Ct. R. of Prac. 9D(2)c (rev. 1986).)

As to the remaining aspect of the reduced sentence, Neb. Rev. Stat. § 39-669.38 (Cum. Supp. 1986) provides that one who, prior to April 19, 1986, had his or her driver's license revoked for life may "submit an application to the court for a reduction . . . [which court] in its discretion may reduce such revocation to a period of fifteen years." We recognize that in *State v. Jameson, ante* p. 38, 395 N.W.2d 744 (1986), a case involving a direct appeal of a county court judgment to the district court and thence to this court, we concluded that defendant's request for reduction of the period of his license revocation should be first referred to the county court as the sentencing court. Upon further reflection, however, we conclude that *State v. Roggenbach*, 223 Neb. 866, 394 N.W.2d 664 (1986), wherein this court, under the same circumstances as presented in *Jameson*, reduced the period of revocation, correctly applies the doctrine announced in *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971), *cert. denied* 403 U.S. 909, 91 S. Ct. 2217, 29 L. Ed. 2d 686; that is, in the absence of a specific contrary legislative mandate, where a criminal statute, after the commission of a prohibited act but before final judgment, is amended by mitigating the punishment, the punishment is that provided by the amendatory act. See *State v. Peiffer*, 212 Neb. 864, 326 N.W.2d 844 (1982). Thus, the district

court correctly reduced the period of defendant's license revocation. *State v. Painter, supra.*

The record not sustaining defendant's assignments of error, the judgments of the district court are affirmed.

AFFIRMED.

WHITE, J., concurring.

This case stands only for the proposition that a checklist signed by a judge, which recites that a defendant was advised of his right to counsel and waived the same, is evidence of the fact.

The opinion does not decide either the type of evidence that may be introduced to establish that counsel was afforded or that there was a knowing waiver of counsel, nor does it decide whether evidence extraneous to the record may be introduced by a defendant to contradict that record. Those questions remain to be decided by this court.

SHANAHAN, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. STUART J. KOCH, APPELLANT.
402 N.W.2d 275

Filed March 13, 1987. No. 86-718.

Motions for New Trial. New evidence offered in support of a motion for new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a new verdict.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Kent E. Florom, Lincoln County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Lisa D. Martin-Price, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

Appellant, Stuart J. Koch, was found guilty by a jury in Lincoln County of two counts of violation of Neb. Rev. Stat. § 28-517 (Reissue 1985), possession of stolen property. The value of the stolen property involved in each count was over $1,000, constituting Class III felonies (Neb. Rev. Stat. § 28-518(1) (Reissue 1985)).

Appellant was sentenced to a term of probation of 5 years, ordered to pay restitution and costs, and ordered to serve a term of 90 days in jail as a condition of probation. In his appeal Koch assigns as the sole error, "The District Court of Lincoln County . . . abused its discretion by overruling Appellant's Motion for New Trial based upon newly discovered evidence." We affirm.

Neb. Rev. Stat. § 25-1142 (Reissue 1985) provides in part:

> A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court. The former verdict, report or decision shall be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party: . . . (7) newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial . . . .

However, "[n]ew evidence offered in support of a motion for new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a new verdict." *State v. Lieberman*, 222 Neb. 95, 103, 382 N.W.2d 330, 336 (1986). Such new evidence must not be merely cumulative. *State v. Hortman*, 207 Neb. 393, 299 N.W.2d 187 (1980).

At issue in the trial was the intent with which appellant possessed a quantity of hives and other related beekeeping equipment, together with the bee colonies. After an inspection by the State Apiarist of two unregistered apiaries, the Apiarist determined that the hives and associated material belonged to two separate beekeepers who had reported thefts of that material. The State Apiarist is an appointee of the Director of Agriculture and exercises the duties specified in Neb. Rev. Stat.

§§ 81-2,165 et seq. (Reissue 1981). The Apiarist testified that each beekeeper generally has a distinctive brand on his equipment, distinctive hive design, and frequently distinctive color combinations. It is sufficient to say that the evidence was overwhelming that the hives and associated equipment were stolen from the two beekeepers, that appellant had attempted to disguise the origin of the hives by painting and chiseling brand marks, and that the value of the property possessed exceeded $1,000 on each count.

It was the position of the appellant at trial that the material was purchased by him as agent of the First Unitarian Church of Hershey, Nebraska. First Unitarian Church has no other locatable members save appellant, and he appears to have access to the church funds for his own use. The seller was one Juan Martinez, whose whereabouts were not known. At trial two bills of sale covering the equipment were introduced. The newly discovered evidence is yet another bill of sale that apparently was sent from North Platte to Houston, and from Houston to the pastor of Holy Spirit Catholic Church, who furnished it to appellant.

In addition to being cumulative, the newly discovered evidence falls far short of being persuasive. The trial court was correct in refusing to grant a new trial.

AFFIRMED.

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2. In determining whether a claimant of title by adverse possession met the required burden of proof, we review the record de novo and reach conclusions independent of the trial judge.
Matzke v. Hackbart 535

3. A claim of title by adverse possession must be proved by a preponderance of the evidence.
Matzke v. Hackbart 535

4. Where an exact metes and bounds description is impossible to ascertain from the record, the failure to adequately describe the proposed boundary is fatal to a claim of adverse possession.
Matzke v. Hackbart 535

5. A claimant of title by adverse possession must describe the land adversely possessed in an exact and definite manner.
Matzke v. Hackbart 535

Affidavits

1. Verification of a pleading constitutes no part of a pleading and, ordinarily, is not necessary to vest jurisdiction in a court.
In re Interest of L.D. et al. 249

2. As any other formal matter, an absence of, or defect in, verification is waived by failure to make a proper and timely objection.
In re Interest of L.D. et al. 249

Aggravating and Mitigating Circumstances

1. A defendant may offer any evidence on the issue of mitigation, even though the mitigating factor is not specifically listed in Neb. Rev. Stat. § 29-2523(2) (Reissue 1985).
State v. Palmer 282
State v. Joubert 411

2. The statutory aggravating circumstances set out in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) are not unconstitutionally vague.
State v. Palmer 282

3. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), that a murder be "especially heinous, atrocious, cruel" or "manifest exceptional depravity by ordinary standards of morality and intelligence," describes in the disjunctive at least two distinct components of the aggravating circumstance which may operate in conjunction with or independent of one another.
State v. Palmer 282
State v. Joubert 411

4. The presence of any of the components of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) will sustain a finding that aggravating circumstance (1)(d) exists.
State v. Palmer 282
State v. Joubert 411
5. The words "especially heinous, atrocious, cruel," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), mean a conscienceless or pitiless crime which is unnecessarily torturous to the victim.
State v. Palmer 282
State v. Joubert 411
6. The phrase "exceptional depravity," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), refers and pertains to the state of mind of the actor and may be proved by or inferred from the defendant's conduct at or near the time of the offense.
State v. Palmer 282
State v. Joubert 411
7. For the purpose of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), "exceptional depravity" exists when the act is totally and senselessly bereft of any regard for human life as shown by the presence of the following circumstances, either separately or collectively: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim.
State v. Palmer 282
8. Any serious assaultive or terrorizing criminal activity committed by the accused prior to the time of the offense may properly be considered when deciding the applicability of Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 1985).
State v. Joubert 411
9. The balancing of aggravating circumstances against mitigating circumstances is not merely a matter of number counting but, rather, requires a careful weighing and examination of the various factors.
State v. Joubert 411
10. For the purpose of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), "exceptional depravity" exists when the act is totally and senselessly bereft of any regard for human life as shown by the presence of the following circumstances, either separately or collectively: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim. Consequently, where one or more of those five factors are present, there may be a finding of "exceptional depravity."
State v. Joubert 411

Aiding and Abetting

1. A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.
   State v. Schreck 650
2. Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.
   State v. Schreck 650

Alimony

1. It is the rule in Nebraska that the division of property and the awarding of alimony in marriage dissolution cases are matters entrusted to the sound discretion of the trial judge. On appeal these matters will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
   Busekist v. Busekist 510
   Gale v. Gale 803
2. The ultimate test in determining correctness in the amount of the alimony awarded is reasonableness as determined by the facts of each case.
   Gale v. Gale 803
3. The factors determining the reasonableness of an award of alimony include the duration of the marriage, history of the contributions to the marriage by each party, the ability of the supported party to engage in gainful employment, and the income and earning capacity of each party, as well as the general equities of each situation.
   Gale v. Gale 803

Antenuptial Agreements

An unambiguous antenuptial agreement which neither expressly nor by reasonable implication indicates an intention of the parties that it be valid upon divorce shall not be valid and binding upon the dissolution of marriage.
Busekist v. Busekist 510

Appeal and Error

1. This court will not overturn the trial court's factual findings when determining the correctness of the trial court's rulings on the suppression of evidence unless those findings are clearly wrong.
   State v. Bowersmith 6
   State v. Copple 672
2. Defendant in a postconviction case bears the burden of establishing a basis for relief, and a conviction will not be set

aside in the absence of a showing that an error created actual prejudice rather than merely the possibility of prejudice.
State v. Cole 10
State v. Fries 482
3. A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal.
State v. Cole 10
State v. Falkner 490
State v. Dillon 503
4. Issues which were known to defendant and counsel at the time of trial and were capable of being raised in a direct appeal, but were not raised in defendant's direct appeal, are not proper grounds for postconviction relief.
State v. Cole 10
State v. Falkner 490
State v. Dillon 503
5. It is within the discretion of the district court to determine whether counsel shall be appointed in a postconviction proceeding to represent defendant on appeal to this court, and in the absence of a showing of abuse of discretion, the failure to appoint counsel is not error.
State v. Cole 10
6. In a prosecution for a felony, error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged unless requested to do so.
State v. Pribil 28
7. Either the State or the defendant may request a lesser-included offense instruction where it is supported by the pleadings and the evidence. However, absent such a request, it is not error for the trial court to fail to give such instruction even though warranted.
State v. Pribil 28
8. Ordinarily, the overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve error.
State v. Borchardt 47
9. One wishing to preserve error on the basis of remarks contained in an opening statement generally must object to the questioned remarks when made, notwithstanding the overruling of a motion in limine.
State v. Borchardt 47
10. A litigant may rely on a trial judge's announcement of what he or she will permit an opponent to do.
State v. Borchardt 47
11. Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike improper material is sustained and the jury is admonished to disregard such material.
State v. Borchardt 47

12. The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.
State v. Borchardt 47

13. A conviction will not be set aside in the absence of a showing that an error created prejudice.
State v. Borchardt 47

14. In resolving a challenge to the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such is for the trier of fact and must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Borchardt 47
State v. Baker 130
State v. Kern 177
State v. Moniz 198
State v. Palmer 282
State v. Clancy 492

15. It is not for this court to accept one version of a case over another; that is for the jury.
State v. Borchardt 47

16. After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if the evidence sustains some rational theory of guilt.
State v. Borchardt 47
State v. Kern 177
State v. Moniz 198
State v. Painter 905

17. The findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
Chlopek v. Schmall 78
Marathon Realty Corp. v. Gavin 458

18. Regarding questions of law, this court has an obligation to reach its conclusion independent from the conclusion reached by a trial court.
Knoell v. Huff 90
In re Estate of Walker 812

19. In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.
State v. Williams 114
State v. Dillon 503

20. Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence.
State v. Baker 130
21. Questions relating to the modification of child support are initially entrusted to the sound discretion of the trial court, and, although on appeal we are required to review the record de novo, in the absence of an abuse of discretion, the decision of the trial court will be affirmed.
Wagner v. Wagner 155
22. Child custody determinations are matters initially entrusted to the sound discretion of the trial court. On appeal the judgment of the trial court will be affirmed in the absence of a clear abuse of discretion.
Ainsworth v. Ainsworth 160
Peterson v. Peterson 557
23. A motion for change of venue filed pursuant to Neb. Rev. Stat. § 29-1301.01 (Reissue 1985) is addressed to the sound discretion of the trial court, whose ruling will not be disturbed absent a clear abuse of that discretion.
State v. Kern 177
24. A trial court abuses its discretion in denying a motion for change of venue where the defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial.
State v. Kern 177
25. The factors used to determine whether a change of venue should have been granted due to pretrial publicity include the nature of the publicity; the degree to which the publicity has circulated throughout the community; the degree to which the publicity circulated in areas to which venue could be changed; the length of time between the dissemination of the publicity complained of and the date of trial; the care exercised and ease encountered in selection of the jury; the number of challenges exercised during the voir dire; the severity of the offense charged; and the size of the area from which the venire is drawn.
State v. Kern 177
26. While any one of several errors may not, in and of itself, warrant a reversal, if all of the errors in the aggregate establish a defendant did not receive a fair trial, a new trial must be granted.
State v. Kern 177
27. Where the appellant's brief assigns no error or fails to make references to the record, the judgment of the lower court will be affirmed, absent any plain error the Nebraska Supreme Court may note.
In re Interest of P.W. 197
In re Interest of J.S., S.C., and L.S. 234

Reynolds v. Myers 509
Leseberg v. Meints 533
State v. Copple 672
In re Interest of A.W. 764
State v. Painter 905

28. The factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.
State v. Moniz 198

29. Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm.
Kahl v. Frederick 212

30. There may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.
State v. Lee 216

31. The only errors which require reversal of a cause are those prejudicial to the rights of the accused or which constitute the denial of a substantial legal right.
State v. Lee 216

32. The withdrawal of a plea is a matter addressed to the discretion of the trial court, and the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion.
State v. Suffredini 220
State v. Hoffman 830

33. Absent an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
State v. Suffredini 220
State v. Kane 245
State v. Kenny 638
State v. Gonzales 659

34. An order terminating parental rights is reviewed de novo on the record in this court.
In re Interest of D.J. et al. 226
In re Interest of J.S., S.C., and L.S. 234
In re Interest of J.W. 897

35. Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter.
In re Interest of L.D. et al. 249

36. Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that

issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte.
In re Interest of L.D. et al. 249
37. An adjudication under Neb. Rev. Stat. § 43-247 (Reissue 1984) of the Nebraska Juvenile Code is an appealable order.
In re Interest of L.D. et al. 249
38. If a lower court does not have subject matter jurisdiction and, therefore, has no power to entertain the proceedings or decide a question, an appellate court lacks jurisdiction to review or evaluate an evidentiary determination for an act outside the jurisdiction of the court whose judgment or order is appealed.
In re Interest of L.D. et al. 249
39. Although an extrajurisdictional act of a lower court cannot vest the appellate court with jurisdiction to review or evaluate an evidentiary determination involved in such act, an appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or final order sought to be reviewed.
In re Interest of L.D. et al. 249
40. Absent an abuse of discretion, the decision of a trial judge on a motion for continuance will be upheld on appeal.
State v. Polyascko 272
State v. Sluyter 768
41. Relief granted pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986) constitutes the disposition of a direct appeal on its merits.
State v. Bean 278
42. In disposing of a case under Neb. Ct. R. of Prac. 3B (rev. 1986), the Nebraska Supreme Court examines the entire record, not only to resolve those matters which are specifically called to its attention by counsel but also to determine whether any possible errors exist.
State v. Bean 278
43. Any matter which can be determined from the record on direct appeal is considered by the Nebraska Supreme Court when ruling on a motion filed pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986). Any such matter is not subject to relitigation in an action brought pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985).
State v. Bean 278
State v. Wilson 721
44. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Palmer 282
45. Retrial after reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute double jeopardy.
State v. Palmer 282

46. The proportionality review made under the requirements of Neb. Rev. Stat. §§ 29-2521.01, 29-2521.02, and 29-2521.03 (Reissue 1985) is limited to a comparison of the facts and circumstances of the death penalty-imposed case under review with those of all applicable cases in which the death penalty was imposed.
State v. Palmer 282
State v. Joubert 411

47. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
State v. Burchett 444

48. Determinations as to the qualifications of a person to be a witness or the admissibility of evidence are matters left to the sound discretion of the trial court, whose rulings will not be upset absent an abuse of discretion.
State v. Burchett 444

49. The Supreme Court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried.
Holden v. Urban 472

50. In the absence of plain error, where an issue is raised for the first time in the Supreme Court, such issue will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition.
Holden v. Urban 472
Leseberg v. Meints 533
Norris v. Iowa Beef Processors 867
State v. Painter 905

51. On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the case for error appearing on the record made in the county court.
Holden v. Urban 472

52. A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous.
Holden v. Urban 472

53. This court will not interfere on appeal with a final order made by the district court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof.
State v. Steele 476
In re Interest of Kinnebrew 885

54. The admission or exclusion of evidence is a matter within the sound discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion.
State v. Clancy 492

55. Determination whether to grant a mistrial is a matter within the sound discretion of a trial court, whose ruling regarding a mistrial will be upheld unless such ruling constitutes an abuse of discretion.
State v. Clancy 492

56. It is the rule in Nebraska that the division of property and the awarding of alimony in marriage dissolution cases are matters entrusted to the sound discretion of the trial judge. On appeal these matters will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
Busekist v. Busekist 510
Gale v. Gale 803

57. A property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization. An appeal may then be taken to the district court from the order of the county board of equalization fixing the assessed value of the property.
Olson v. County of Dakota 516

58. Whether a defendant's guilty plea, which results in a conviction later used as the basis for application of an enhanced penalty, has been made understandingly, intelligently, and voluntarily is not an issue in the Supreme Court's review concerning the validity of an enhanced punishment imposed on a defendant.
State v. Davis 518

59. A decree of foreclosure is a final order for purposes of appeal to this court.
Leseberg v. Meints 533

60. In determining whether a claimant of title by adverse possession met the required burden of proof, we review the record de novo and reach conclusions independent of the trial judge.
Matzke v. Hackbart 535

61. If the statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end.
School Dist. No. 46 v. City of Bellevue 543

62. In determining the intent of the Legislature, the Supreme Court considers the history of the legislation and the reasonableness of an interpretation, weighed against an unreasonable or absurd construction evidently not intended by the Legislature.
County of Lancaster v. Maser 566

63. In an appeal regarding disqualification of benefits under Neb. Rev. Stat. § 48-628(b) (Reissue 1984), the Supreme Court retries

factual questions de novo on the record and reaches conclusions independent of those reached by the district court.
O'Keefe v. Tabitha, Inc. 574

64. In appeals under Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986), we review the causes de novo on the record, retry the issues of fact, and come to independent conclusions regarding the findings challenged.
Ponderosa Villa v. Hughes 627

65. A trial court's finding that a prima facie case has been established concerning existence of a conspiracy will be upheld unless such finding is clearly erroneous.
State v. Copple 672

66. Whether a witness is qualified as an expert is a preliminary question for a trial court. Neb. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)). Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion.
State v. Copple 672

67. In order that assignments of error as to the admission or rejection of evidence may be considered, the Supreme Court requires that appropriate reference be made to the specific evidence against which objection is urged. A party who claims error in a proceeding is required to point out the factual and legal basis that shows the error.
State v. Copple 672

68. Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. All other instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
State v. Copple 672
Steed v. Oak Ridge Equestrian Ctr. 792

69. The findings of fact made by the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
Bender v. Norfolk Iron & Metal Co. 706
Ward v. City of Mitchell 711
Norris v. Iowa Beef Processors 867

70. We must consider the evidence in the light most favorable to the successful party, when testing the sufficiency of the evidence

supporting the Workers' Compensation Court's findings of fact.
Ward v. City of Mitchell 711
Norris v. Iowa Beef Processors 867

71. When the record presents nothing more than conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workers' Compensation Court.
Ward v. City of Mitchell 711

72. A conviction must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Tweedy 715

73. Whether to grant probation instead of a jail sentence is a matter left to the trial court's discretion. Absent an abuse of discretion, a sentence imposed within the statutory limits will be upheld on appeal.
State v. Tweedy 715

74. A conviction will not be set aside in the absence of a showing that an error prejudiced the defendant.
State v. Burling 725

75. A brief may not expand the evidentiary record and must limit itself to arguments supported by the record.
Father Flanagan's Boys' Home v. Goerke 731

76. If a district court lacks power to adjudicate whether a claim is meritorious, the Supreme Court also lacks power to determine the merit of the claim which was the subject matter of the proceedings in the district court.
Andrews v. City of Lincoln 748
In re Complaint of Fecht 752

77. The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.
State v. Davis 771

78. In viewing a matter on appeal we are guided by the rule that where evidence is in conflict or reasonable minds may differ, it is normally within the province of the jury to decide issues of fact.
Chirnside v. Lincoln Tel. & Tel. Co. 784

79. It is not error for the trial court to refuse a requested instruction when it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case.
Steed v. Oak Ridge Equestrian Ctr. 792

80. Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. Ordinarily, it is error to submit to the jury an issue which is not pleaded in the case.
Steed v. Oak Ridge Equestrian Ctr. 792

81. The ultimate test in determining correctness in the amount of the

alimony awarded is reasonableness as determined by the facts of each case.
Gale v. Gale 803

82. The factors determining the reasonableness of an award of alimony include the duration of the marriage, history of the contributions to the marriage by each party, the ability of the supported party to engage in gainful employment, and the income and earning capacity of each party, as well as the general equities of each situation.
Gale v. Gale 803

83. A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court.
Gaughan v. Gilliam 836

84. Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly wrong. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, Neb. Rev. Stat. § 48-185 (Reissue 1984) precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court.
Norris v. Iowa Beef Processors 867

85. In an appeal after rehearing in the Nebraska Workers' Compensation Court, the Supreme Court will consider only those issues or questions properly presented and disposed in the Nebraska Workers' Compensation Court.
Norris v. Iowa Beef Processors 867

86. A district court reviews the determination of a mental health board de novo on the record.
In re Interest of Kinnebrew 885

87. The transcript of the proceeding before a mental health board may not be treated as evidence before the board, the district court, or this court unless the facts in the transcript are offered as evidence, are not objected to, and are reviewed by the trier of fact.
In re Interest of Kinnebrew 885

88. In a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal.
State v. Pointer 892
State v. Roggenkamp 914

89. Where there is a dispute in the evidence, this court will give great weight to the juvenile court's findings because it heard and observed the parties and witnesses.
In re Interest of J.W. 897

90. A guilty verdict will not be reversed by this court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law.
State v. Painter 905
91. Looking at the role of the district court in appeals from county court, it is clear that the district court is considered to be an intermediate court of appeals and not a trial court.
State v. Painter 905
92. Just as the Supreme Court may, on a motion for rehearing, timely modify its opinion, an intermediate appellate court may also timely modify its opinion.
State v. Painter 905
93. Error may not be predicated on a ruling which admits evidence unless a substantial right of a party is affected and a timely objection appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context. Neb. Evid. R. 103(1)(a) (Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1985)).
State v. Roggenkamp 914
94. If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error.
State v. Roggenkamp 914
95. A party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with such stipulation.
State v. Roggenkamp 914
96. In an appeal of a criminal case to the district court, the latter acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or an abuse of discretion.
State v. Thompson 922
97. The State has the right to appeal a district court modification of a sentence imposed by a county court.
State v. Thompson 922

Arrests

1. Generally, as a practical matter, no criminal investigation is complete until sufficient facts have been obtained to justify the arrest and conviction of the defendant.
State v. Nissen 60
2. The obligation of an officer making an arrest under a warrant is twofold: to apprehend the person named in the warrant and to avoid interfering with one not involved.
State v. Nissen 60
3. Law enforcement officers have a legitimate right to question persons about the identity of the subject of an arrest warrant before they arrest the suspect; and although persons so questioned may have the right to refuse to answer such inquiry, if they choose

to answer they may not give false information without subjecting themselves to criminal liability.
State v. Nissen 60

4. The test of probable cause for a warrantless arrest is whether, at the time of the arrest, the officer had knowledge of facts and circumstances based on reasonably trustworthy information which was sufficient to warrant a prudent man in believing the defendant had committed or was committing an offense.
State v. Evans 64
State v. Bishop 522
State v. Roggenkamp 914

5. A suspect may not defeat a warrantless arrest which has been set in motion in a public place upon probable cause by the expedient of escaping to a private place.
State v. Bishop 522

Attorney and Client

1. A lawyer should represent a client zealously within the bounds of the law.
State v. Borchardt 47

2. It is the duty of defense counsel to represent their clients in a manner consistent with the prevailing professional standard within their community. Implicit in that duty is a duty to conscientiously protect the interests of the client—a duty which is an integral part of every attorney-client relationship.
State v. Fries 482

3. Multiple representation does not give rise to a denial of the defendant's sixth amendment right to effective assistance of counsel unless an actual conflict of interest exists and that conflict affects the performance of counsel.
State v. Wilson 721

Attorneys at Law

In appearing in his or her professional capacity before a tribunal, a lawyer shall not state or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
State v. Borchardt 47

Banks and Banking

1. The Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 et seq. (Reissue 1983), is not the exclusive remedy under Nebraska law in cases involving the sale of securities.
Knoell v. Huff 90

2. A bank may set off the funds of a depositor to pay a debt due the bank from the depositor, and, absent an agreement to the contrary or specific instructions from the debtor, a creditor may apply the

proceeds to such debts and in such order as the creditor determines.
First Nat. Bank v. Benedict Consol. Indus. 860

Blood, Breath, and Urine Tests

1. There is no requirement in this jurisdiction that *Miranda* warnings be given prior to a request to submit to a chemical test of blood, breath, or urine.
State v. Bishop 522
2. Under the implied consent law, a driver is not entitled to consult with an attorney, nor is a delay in the test required should a driver request to consult with an attorney.
State v. Bishop 522
3. A chemical test result of one's body fluid for alcohol content which is subject to a margin of error must be adjusted so as to give the defendant the benefit of that margin.
State v. Burling 725

Boundaries

1. In an action to establish a boundary line in accordance with Neb. Rev. Stat. § 34-301 (Reissue 1984), one need not present a survey that qualifies as an official record of survey under Neb. Rev. Stat. § 81-8,122.01 (Cum. Supp. 1986).
Matzke v. Hackbart 535
2. Proof of the adverse nature of the possession of the land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description.
Matzke v. Hackbart 535
3. Where an exact metes and bounds description is impossible to ascertain from the record, the failure to adequately describe the proposed boundary is fatal to a claim of adverse possession.
Matzke v. Hackbart 535
4. A claimant of title by adverse possession must describe the land adversely possessed in an exact and definite manner.
Matzke v. Hackbart 535
5. Notwithstanding that the statute provides that a school district is a body corporate, possesses the usual powers of a corporation for public purposes, and may sue and be sued, it is the law of this state that a school district may not maintain an action involving a change in the boundaries of a school district.
School Dist. No. 46 v. City of Bellevue 543
6. The fixing of boundaries of school districts is exclusively a legislative function, and it may be properly delegated to a subordinate agency, providing the Legislature prescribes the manner and the standards under which the power of the

designated board may be exercised. The Legislature may delegate this authority provided it states the purpose for doing so and sets up reasonable standards to guide the agency which is to administer it.
School Dist. No. 46 v. City of Bellevue 543

Breach of Contract

1. The general measure of damages for a breach of contract to convey land is the difference between the market value of the land at the time of the breach and the price set out in the contract.
Turner v. Alberts 632
2. The exception to the general rule is that where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made.
Turner v. Alberts 632

Brokers

1. In order for a broker employed to secure a purchaser of realty to recover a commission, his or her efforts must be the efficient procuring cause of the sale.
Marathon Realty Corp. v. Gavin 458
2. The efforts of a broker employed to secure a purchaser of realty have been the efficient procuring cause of the sale when the broker has secured a prospective purchaser who is ready, willing, and able to buy the property on terms and conditions upon which the broker is authorized to secure a purchaser, or on terms acceptable to the seller.
Marathon Realty Corp. v. Gavin 458
3. Efforts which produce a series of unbroken, continuous events culminating in the sale of realty are the efficient procuring cause of the sale, notwithstanding the fact that such efforts may not be the sole cause of the sale.
Marathon Realty Corp. v. Gavin 458
4. A broker is not entitled to a commission for producing a prospective buyer willing to execute only an option to purchase realty.
Marathon Realty Corp. v. Gavin 458
5. Neb. Rev. Stat. § 36-107 (Reissue 1984) requires that every contract between the owner and any broker or agent employed to sell land is void unless the contract is in writing and subscribed by both the owner and the broker or agent; the contract must also describe the land to be sold and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.
Marathon Realty Corp. v. Gavin 458
6. One who is a joint owner of realty but represents himself or herself to be the sole owner thereof may not avoid full payment of an

agreed commission on the ground that another also has an interest in the property.
Marathon Realty Corp. v. Gavin 458

7. A broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed or by said owner's inability to convey good title to real estate because of the failure to obtain a joinder in the conveyance by a third party who has an interest in the land.
Marathon Realty Corp. v. Gavin 458

Case Disapproved

The trial court may instruct on a lesser-included offense over the objection of the defendant if the information or complaint charging the crime is such as to give the defendant notice that he or she could at the same time face the lesser-included offense charge. To the extent that *McConnell v. State*, 77 Neb. 773, 110 N.W. 666 (1906), contains language to the contrary, such language is expressly disapproved.
State v. Pribil 28

Case Overruled

1. To the extent that any prior cases would limit the total compensation for damage to personal property to the fair market value of the property immediately before the injury, they are expressly overruled.
Chlopek v. Schmall 78

2. *Bish v. Fletcher*, 219 Neb. 863, 366 N.W.2d 778 (1985), is overruled.
County of Lancaster v. Maser 566

Child Custody

1. Child custody determinations are matters initially entrusted to the sound discretion of the trial court. On appeal the judgment of the trial court will be affirmed in the absence of a clear abuse of discretion.
Ainsworth v. Ainsworth 160
Peterson v. Peterson 557

2. The paramount consideration in determining who should have the care and custody of minor children following dissolution of a marriage is the best interests of the children.
Ainsworth v. Ainsworth 160

3. Where the custody of a minor child is involved, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is

unfit to perform the duties imposed by the relationship or has forfeited that right.
Peterson v. Peterson 557
4. As authorized by Neb. Rev. Stat. § 42-364 (Reissue 1984), a district court may maintain legal custody while awarding physical custody to a parent or other party. Section 42-364 authorizes the court to place the custody of a minor child in the court, to determine custody on the basis of the best interests of the child, and to make subsequent changes when required. When the best interests of a child, in regard to custody, are not clear, the court may, and should, place custody in the court.
Peterson v. Peterson 557
5. Joint custody is not favored by the courts of this state and will be reserved for only the rarest of cases.
Wilson v. Wilson 589
6. A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court.
Gaughan v. Gilliam 836
7. A question present in every habeas corpus case for custody of a child is the welfare and best interests of the child.
Gaughan v. Gilliam 836

Child Support

1. A proceeding to modify a child support order is not a retrial of the original case nor a review of the original decree.
Wagner v. Wagner 155
2. The paramount issue in child support cases, whether originally or in proceedings for modification, remains the best interests of the children.
Wagner v. Wagner 155
3. Increased age of children alone will not furnish a satisfactory basis for a modification of child support unless accompanied by competent evidence of the actual increase in the cost of maintaining the children.
Wagner v. Wagner 155
4. Although as a general rule a decree awarding child support will not be modified because of a change of circumstances which was in the contemplation of the parties at the time the original or preceding order was made, we limit that rule to include only those anticipated changes which were specifically noted on the record made at the time of entry of the previous order. To the extent that the language of *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985), has been misinterpreted, that interpretation is expressly disapproved.
Wagner v. Wagner 155

5. Questions relating to the modification of child support are initially entrusted to the sound discretion of the trial court, and, although on appeal we are required to review the record de novo, in the absence of an abuse of discretion, the decision of the trial court will be affirmed.
Wagner v. Wagner 155
6. A significant increase in the appellant's income, along with the increased ages of the children and the inability of the appellee to afford to pay the children's bills on the current support payment, meets the requirement of a material change in circumstances and supports the trial court's decision to modify child support payments.
Wilson v. Wilson 589

Circumstantial Evidence

1. A conviction may be based on circumstantial evidence where the evidence, taken as a whole, establishes guilt beyond a reasonable doubt.
State v. Baker 130
2. A person charged with a crime may be convicted solely upon the basis of circumstantial evidence.
State v. Baker 130
State v. Palmer 282
3. Circumstantial evidence may establish the operation or actual physical control of a motor vehicle, under the provisions of Neb. Rev. Stat. § 39-669.07 (Reissue 1984).
State v. Baker 130
4. Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish defendant's guilt beyond a reasonable doubt.
State v. Kane 245
State v. Hunt 594
5. One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt.
State v. Clancy 492
6. Circumstantial evidence may establish existence of a conspiracy or the criminal intent necessary for a conspiracy.
State v. Copple 672

Claims

1. Concerning a contract claim against a city of the primary class, Neb. Rev. Stat. § 15-840 (Reissue 1983) requires that such claim be filed with the city clerk and disallowed before a claimant, pursuant to Neb. Rev. Stat. § 15-841 (Reissue 1983), may timely

appeal from the city's disallowance and thereby become entitled to invoke a district court's power to adjudicate the merit of the disallowed claim.
Andrews v. City of Lincoln 748

2. If a district court lacks power to adjudicate whether a claim is meritorious, the Supreme Court also lacks power to determine the merit of the claim which was the subject matter of the proceedings in the district court.
Andrews v. City of Lincoln 748

Collateral Attack

A collateral attack on valuation of property for tax purposes is permissible only if the assessment is partially or entirely void.
Olson v. County of Dakota 516

Confessions

1. Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."
State v. Bowersmith 6

2. To be admissible as evidence in his trial, an accused's statements must have been voluntarily made and must not have been the product of any inducement, no matter how slight.
State v. Bowersmith 6

Conflict of Interest

1. There is a presumption of prejudice involving a defendant's constitutional right to effective assistance of counsel when a defendant demonstrates (1) counsel actively represented conflicting interests and (2) an actual conflict of interest adversely affected performance by the defendant's lawyer. Such conflicts of interest must be shown to have resulted in counsel's conduct detrimental to the defense.
State v. Williams 114

2. Multiple representation does not give rise to a denial of the defendant's sixth amendment right to effective assistance of counsel unless an actual conflict of interest exists and that conflict affects the performance of counsel.
State v. Wilson 721

Conspiracy

1. The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong

against or injury upon another. The very nature of a conspiracy requires an element of intent.
State v. Copple 672
Steed v. Oak Ridge Equestrian Ctr. 792
2. Circumstantial evidence may establish existence of a conspiracy or the criminal intent necessary for a conspiracy.
State v. Copple 672
3. When a conspiracy has been proved, a conspirator's acts and declarations, in furtherance of the conspiracy, are the acts and declarations of all conspirators and are admissible evidence against the coconspirators.
State v. Copple 672
4. An overt act, as something done pursuant to a conspiracy, tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. An overt act, by itself, need not have the capacity to accomplish the conspiratorial objective and does not have to be a criminal act.
State v. Copple 672
5. Silence, which is designed to conceal, may indicate an intention to conspire and, if intended to facilitate the conspiracy, may be an overt act pursuant to the conspiracy.
State v. Copple 672
6. For admission of a coconspirator's act as evidence against a defendant-coconspirator being tried for a crime other than the conspiracy itself, the trial court must first determine whether the State has proved a prima facie case that (1) a conspiracy existed, (2) the defendant and the witness were members of the conspiracy, and (3) the witness' act was done during and in furtherance of the conspiracy.
State v. Copple 672
7. Whether the State has established a prima facie case of conspiracy, thereby constituting anything within execution or furtherance of the common purpose as the act of every coconspirator, is a preliminary question for the trial court concerning admissibility of evidence. Neb. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)).
State v. Copple 672
8. A trial court's finding that a prima facie case has been established concerning existence of a conspiracy will be upheld unless such finding is clearly erroneous.
State v. Copple 672
9. It is necessary to prove the existence of at least an implied agreement, to establish a conspiracy.
Steed v. Oak Ridge Equestrian Ctr. 792

Constitutional Law

1. Determinations as to whether a person has been seized, in the constitutional sense, are questions of fact.
State v. Bowersmith 6
2. The *Miranda* warnings are procedural safeguards intended to secure the privilege against compelled self-incrimination.
State v. Evans 64
3. As a result of Neb. Const. art. I, § 11, and U.S. Const. amend. VI, the right to counsel is the right to effective assistance of counsel. For effective assistance of counsel a defendant is constitutionally entitled to a lawyer's representation free from conflicting interests.
State v. Williams 114
4. There is a presumption of prejudice involving a defendant's constitutional right to effective assistance of counsel when a defendant demonstrates (1) counsel actively represented conflicting interests and (2) an actual conflict of interest adversely affected performance by the defendant's lawyer. Such conflicts of interest must be shown to have resulted in counsel's conduct detrimental to the defense.
State v. Williams 114
5. Notwithstanding constitutional mandates regarding a jury trial, such as the sixth amendment to the U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution, there is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of imprisonment of 6 months or less.
State v. Kennedy 164
6. There may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.
State v. Lee 216
7. The only errors which require reversal of a cause are those prejudicial to the rights of the accused or which constitute the denial of a substantial legal right.
State v. Lee 216
8. The statutory aggravating circumstances set out in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) are not unconstitutionally vague.
State v. Palmer 282
9. A convicted defendant is not entitled to all of the same rights accorded one merely accused of a crime but not yet convicted.
State v. Palmer 282
10. There is no constitutional requirement that the death penalty be imposed by a jury.
State v. Palmer 282

11. Neb. Rev. Stat. § 29-2006(3) (Reissue 1985) held constitutional.
State v. Burchett 444
12. Prospective jurors who are unable to fairly determine guilt because of their opposition to capital punishment are not a cognizable group.
State v. Burchett 444
13. Lack of jury members of the same race as the defendant, standing alone, does not support a claim of improper racial composition of the jury.
State v. Falkner 490
14. All that the Constitution forbids is systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels. The burden is on the defendant to allege and prove such systematic exclusion.
State v. Falkner 490
15. Evidence obtained in the implied consent context is not testimonial or communicative and does not fall within the privilege against self-incrimination.
State v. Bishop 522
16. The U.S. Constitution, through the due process clause of the 14th amendment, requires the states to provide a trial by jury whenever the 6th amendment would so require if the case were in federal court.
State v. Bishop 522
State v. Lafler 613
17. A voluntary waiver of the constitutional right to a jury trial must be express and intelligent.
State v. Bishop 522
18. If the statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end.
School Dist. No. 46 v. City of Bellevue 543
19. If the legislature has made a reasonable classification, one that is not a mere cloak or cover for an arbitrary exemption of certain persons or a certain class of persons, but a natural and proper selection of those who, upon a reasonable view of the mischiefs to be met, should be subject to the regulations prescribed, and the law is made to operate generally and uniformly upon all of the class so constituted, the constitutional provision in question is not violated.
School Dist. No. 46 v. City of Bellevue 543
20. An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is

constitutionally entitled to a jury trial.
State v. Lafler 613

21. A waiver of the constitutional right to a jury trial cannot be presumed from a silent record.
State v. Lafler 613

22. Fourth amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.
State v. Kenny 638

23. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his fourth amendment rights infringed.
State v. Kenny 638

24. A statute which is clear and precise, and therefore not vague, may nonetheless fail to pass constitutional muster by virtue of being overbroad in the sense that it prohibits the exercise of constitutionally protected conduct.
State v. Copple 672

25. Irrespective of standing to challenge a statute for vagueness, an individual may have standing to assert that a statute is overbroad when such statute reaches a substantial amount of constitutionally protected conduct.
State v. Copple 672

26. In determining whether standing exists for a facial challenge to a statute as overbroad, a court must first determine whether the statute reaches a substantial amount of constitutionally protected conduct. If the statutory proscription does not reach a substantial amount of constitutionally protected conduct, there is no standing to challenge a statute on the basis that the statute is overbroad, and such challenge must fail.
State v. Copple 672

27. In order to have standing to challenge a statute on the ground of vagueness, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of a law as applied to the conduct of others.
State v. Copple 672

28. An essential purpose of a penal statute is to provide notice to the ordinary person concerning conduct which is proscribed as criminal. When a penal statute supplies an ordinary person with notice concerning conduct forbidden as criminal, such statute meets the constitutional standard of due process.
State v. Copple 672

29. Multiple representation does not give rise to a denial of the defendant's sixth amendment right to effective assistance of counsel unless an actual conflict of interest exists and that conflict affects the performance of counsel.
State v. Wilson 721

30. The Constitution of this state distributes the powers of government to three separate and coequal departments or branches, namely, the legislative, executive, and judicial branches, and prohibits any one branch from exercising any power belonging to another branch.
State v. Burling 725

31. Determining whether evidence, if believed, is sufficient to sustain a conviction is a judicial function.
State v. Burling 725

32. The Legislature may not declare the weight to be given to evidence or what evidence shall be conclusive proof of an issue of fact.
State v. Burling 725

33. Whether evidence is of probative value is a legal question, the judicial analysis and resolution of which the Legislature cannot impair.
State v. Burling 725

34. Once a defendant has been informed of the rights required by *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), there is no requirement that the same information be conveyed to a defendant on each subsequent court appearance.
State v. Hoffman 830

Contracts

1. A person who contracts with a corporation is estopped from later denying its corporate existence.
Forker Solar, Inc. v. Knoblauch 143

2. Once an option to purchase is exercised, it becomes a contract for the purchase and sale of the realty.
Marathon Realty Corp. v. Gavin 458

3. Neb. Rev. Stat. § 36-107 (Reissue 1984) requires that every contract between the owner and any broker or agent employed to sell land is void unless the contract is in writing and subscribed by both the owner and the broker or agent; the contract must also describe the land to be sold and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.
Marathon Realty Corp. v. Gavin 458

4. Matters which seek to avoid a valid contract are affirmative defenses.
Lease Northwest v. Davis 617

5. Where the parties have contracted for the payment of a particular lawful rate of interest, such contract controls and the rate thus fixed is recoverable in accordance with the terms of the contract.
Lease Northwest v. Davis 617

6. An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made.
Waylett v. United Servs. Auto. Assn. 741

7. An insurance policy is to be construed as any other contract; if its terms are clear, they are to be applied according to their plain and ordinary meaning.
Waylett v. United Servs. Auto. Assn. 741
8. The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.
Waylett v. United Servs. Auto. Assn. 741
9. Concerning a contract claim against a city of the primary class, Neb. Rev. Stat. § 15-840 (Reissue 1983) requires that such claim be filed with the city clerk and disallowed before a claimant, pursuant to Neb. Rev. Stat. § 15-841 (Reissue 1983), may timely appeal from the city's disallowance and thereby become entitled to invoke a district court's power to adjudicate the merit of the disallowed claim.
Andrews v. City of Lincoln 748

Controlled Substances

When an employee of the city, whose duties in part are to help apprehend persons using marijuana, himself engages in such activity, such action does constitute an act unbecoming an incumbent of the particular position, does affect the efficient conduct of the business of the city, and is not in the best interest of the city government.
Ostwald v. City of Omaha 530

Conversion

1. As a general rule, provided the property can be traced or identified, any third person who has obtained trust property or its product by a transfer made in violation of the trust may be subject to a constructive trust. It is necessary, however, that the property can be traced or identified.
In re Estate of Redpath 845
2. If the trustee makes a withdrawal from the mixed account for an admittedly personal purpose, for example, to pay his living expenses or his individual debts, or for an unknown purpose, such withdrawal will be charged to the personal part of the account as long as there remains any cash or credit in such personal portion of the account. It will be only after the personal credit or cash is exhausted that withdrawals for personal or unknown purposes will be charged to the trust side of the account.
In re Estate of Redpath 845
3. When a trustee wrongfully commingles trust money with his own and makes payments from the common fund, it will be presumed that he paid out his own money, and not the trust money.
In re Estate of Redpath 845

Convictions

1. Defendant in a postconviction case bears the burden of establishing a basis for relief, and a conviction will not be set aside in the absence of a showing that an error created actual prejudice rather than merely the possibility of prejudice.
State v. Cole 10
State v. Borchardt 47
State v. Burling 725

2. Generally, for prosecutorial misconduct to warrant vacation of a conviction, there must be evidence of prejudice to the defendant's right to a fair and impartial trial.
State v. Evans 64

3. A conviction may be based on circumstantial evidence where the evidence, taken as a whole, establishes guilt beyond a reasonable doubt.
State v. Baker 130

4. A person charged with a crime may be convicted solely upon the basis of circumstantial evidence.
State v. Baker 130
State v. Palmer 282

5. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and a finding made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Kern 177
State v. Moniz 198
State v. Palmer 282

6. A finding of guilt may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if that evidence sustains some rational theory of guilt.
State v. Moniz 198

7. Only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, will a trial court be justified in directing a verdict of not guilty.
State v. Kane 245
State v. Hunt 594

8. Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish defendant's guilt beyond a reasonable doubt.
State v. Kane 245
State v. Hunt 594

9. Each case must be considered on its own facts, and convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
State v. Palmer 282

10. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
State v. Palmer 282

11. A convicted defendant is not entitled to all of the same rights accorded one merely accused of a crime but not yet convicted.
State v. Palmer 282

12. A criminal conviction may be based upon the uncorroborated statements of an accomplice.
State v. Burchett 444

13. In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury—all of which is within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
State v. Clancy 492
State v. Tweedy 715

Corporations

1. A person who contracts with a corporation is estopped from later denying its corporate existence.
Forker Solar, Inc. v. Knoblauch 143

2. A general denial does not put corporate character in issue.
Forker Solar, Inc. v. Knoblauch 143

Corroboration

A victim need not be independently corroborated on the particular acts constituting a sexual assault, but must be corroborated on the material circumstances and facts tending to support the victim's testimony.
State v. Polyascko 272

Courts

1. Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm.
   Kahl v. Frederick 212
2. Motions to revoke probation must be filed in the sentencing court. Where a probationer was tried, convicted, and sentenced in the county court, it is the county court, not the district court which served in its appellate capacity, that has jurisdiction to hear a motion to revoke probation.
   State v. Daniels 264
3. On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the case for error appearing on the record made in the county court.
   Holden v. Urban 472
4. As authorized by Neb. Rev. Stat. § 42-364 (Reissue 1984), a district court may maintain legal custody while awarding physical custody to a parent or other party. Section 42-364 authorizes the court to place the custody of a minor child in the court, to determine custody on the basis of the best interests of the child, and to make subsequent changes when required. When the best interests of a child, in regard to custody, are not clear, the court may, and should, place custody in the court.
   Peterson v. Peterson 557
5. Where a cause has been appealed to the Supreme Court from a district court exercising appellate jurisdiction, only issues properly presented to and passed upon by the district court may be raised on appeal to this court.
   State v. Painter 905
6. Looking at the role of the district court in appeals from county court, it is clear that the district court is considered to be an intermediate court of appeals and not a trial court.
   State v. Painter 905
7. Just as the Supreme Court may, on a motion for rehearing, timely modify its opinion, an intermediate appellate court may also timely modify its opinion.
   State v. Painter 905
8. In an appeal of a criminal case to the district court, the latter acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or an abuse of discretion.
   State v. Thompson 922
9. The State has the right to appeal a district court modification of a sentence imposed by a county court.
   State v. Thompson 922

Criminal Law

1. Intent may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his or her conduct.
State v. Robb 14

2. To secure a change of venue the defendant must show that pretrial publicity has made it impossible to secure a fair and impartial jury.
State v. Heathman 19

3. Nebraska's escape statute, Neb. Rev. Stat. § 28-912 (Reissue 1985), defines one offense and sets out factors which, if present, change the range of the penalty.
State v. Heathman 19

4. Just as a wrong date in an information will not preclude a defendant from being sentenced as a habitual criminal if the record discloses the defendant could not have been misled or confused, so, too, a wrong date in a complaint will not preclude a defendant from being sentenced as one who has previously been convicted of driving while under the influence of alcohol if the record discloses that the defendant could not have been misled or confused.
State v. Jameson 38

5. The responsibility of a public prosecutor differs from that of the usual advocate; his or her duty is to seek justice, not merely to convict. This special duty exists because (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial, the prosecutor is not only an advocate but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence known to him or her that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.
State v. Borchardt 47

6. Generally, as a practical matter, no criminal investigation is complete until sufficient facts have been obtained to justify the arrest and conviction of the defendant.
State v. Nissen 60

7. The obligation of an officer making an arrest under a warrant is twofold: to apprehend the person named in the warrant and to avoid interfering with one not involved.
State v. Nissen 60

8. The language of Neb. Rev. Stat. § 28-907(1)(a) (Reissue 1985), "to impede the investigation of an actual criminal matter," includes the impeding of the gathering of information as to the identity of a defendant named in an arrest warrant.
State v. Nissen 60

9. Law enforcement officers have a legitimate right to question persons about the identity of the subject of an arrest warrant before they arrest the suspect; and although persons so questioned may have the right to refuse to answer such inquiry, if they choose to answer they may not give false information without subjecting themselves to criminal liability.
State v. Nissen 60

10. To sustain a claim of ineffective assistance of counsel and obtain reversal of a criminal judgment, a defendant must show (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.
State v. Williams 114

11. Notwithstanding constitutional mandates regarding a jury trial, such as the sixth amendment to the U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution, there is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of imprisonment of 6 months or less.
State v. Kennedy 164

12. The factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.
State v. Moniz 198

13. Motions to revoke probation must be filed in the sentencing court. Where a probationer was tried, convicted, and sentenced in the county court, it is the county court, not the district court which served in its appellate capacity, that has jurisdiction to hear a motion to revoke probation.
State v. Daniels 264

14. In a general sense an ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed.
State v. Palmer 282

15. Not all retroactive legislation is in violation of the prohibition against ex post facto laws.
State v. Palmer 282

16. A legislature may not enact any law which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed.
State v. Palmer 282

17. Statutes which simply enlarge the class of person who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage, for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.
State v. Palmer 282
18. No one has a vested right in a procedure; procedural matters can be changed at any time before trial and are binding on the defendant.
State v. Palmer 282
19. A "crime" is an act or omission for which one is subject to punishment by public authority.
State v. Palmer 282
20. "Violence" is the exertion of physical force so as to injure or abuse.
State v. Palmer 282
21. "Crime of violence" is an act which injures or abuses through the use of physical force and which subjects the actor to punishment by public authority.
State v. Palmer 282
22. A convicted defendant is not entitled to all of the same rights accorded one merely accused of a crime but not yet convicted.
State v. Palmer 282
23. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
State v. Burchett 444
State v. Tweedy 715
24. In a prosecution for a crime of violence, the defendant's spouse may be called to testify against the defendant as to any matter, including confidential communications. Neb. Rev. Stat. § 27-505(3)(a) (Reissue 1985).
State v. Burchett 444
25. An accomplice's testimony is admissible notwithstanding the fact that the testimony is procured by means of a plea bargain.
State v. Burchett 444
26. The promise of leniency or otherwise favorable prosecutorial treatment goes only to the credibility of the accomplice's testimony, not to its admissibility.
State v. Burchett 444
27. Generally, it is only where the prosecution has bargained for false

or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require its preclusion.
State v. Burchett 444
28. Prosecutions for felonies, including murder, may be had on informations filed by the county attorney.
State v. Burchett 444
29. Penal statutes are to be strictly construed, and it is not for us to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.
State v. Steele 476
30. The U.S. Constitution, through the due process clause of the 14th amendment, requires the states to provide a trial by jury whenever the 6th amendment would so require if the case were in federal court.
State v. Bishop 522
State v. Lafler 613
31. Indigency, as used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), means the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family.
State v. Lafler 613
32. In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), a court is to consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.
State v. Lafler 613
33. An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.
State v. Lafler 613
34. An essential purpose of a penal statute is to provide notice to the ordinary person concerning conduct which is proscribed as criminal. When a penal statute supplies an ordinary person with notice concerning conduct forbidden as criminal, such statute meets the constitutional standard of due process.
State v. Copple 672
35. At a hearing to determine whether the State had violated its agreement for immunity and restricted evidence or information, the State must present a prima facie case that it has fulfilled its agreement with the defendant, that is, demonstrate that the State's evidence, to be adduced at the defendant's trial, was obtained from a source or sources independent of the defendant and not by

direct or indirect use of information obtained from the defendant as the result of defendant's agreement for immunity and restricted evidence or information.
State v. Copple 672
36. If a prosecutor has a duty to disclose a statement in response to a general discovery request, it must derive from the obviously exculpatory character of the evidence.
State v. Tweedy 715
37. In order for an omitted statement to be considered material, it must create a reasonable doubt as to the defendant's guilt that did not otherwise exist. That the evidence "might" influence the outcome is insufficient.
State v. Tweedy 715
38. Where omitted evidence would have been cumulative and repetitive, the defendant suffered no prejudice because of the omission.
State v. Tweedy 715
39. When the sufficiency of the evidence as to criminal intent is questioned, the law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
State v. Tweedy 715
40. A law which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed is an ex post facto law and insofar as it affects the punishment of the party to his disadvantage is void.
State v. Duran 774
41. Restitution ordered by a court pursuant to Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1986) is a criminal penalty imposed as punishment for the crime, not an administrative or civil penalty as is restitution under Neb. Rev. Stat. § 28-427 (Reissue 1985).
State v. Duran 774
42. A court is without authority to impose a criminal penalty for a crime unless the law authorizing such penalty was effective on or before the date of the commission of the crime.
State v. Duran 774
43. Once a defendant has been informed of the rights required by *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), there is no requirement that the same information be conveyed to a defendant on each subsequent court appearance.
State v. Hoffman 830
44. Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the

amendatory act unless the Legislature has specifically provided otherwise.
State v. Painter 905
State v. Thompson 922

45. In an appeal of a criminal case to the district court, the latter acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or an abuse of discretion.
State v. Thompson 922

Damages

1. Where the damage to personal property can, at a reasonable cost, be repaired and the property restored to substantially its condition immediately before the damage occurred, and the cost of repair does not exceed the difference in market value of the property before and after the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the loss of use of the property for the reasonable amount of time required to complete the repair.
Chlopek v. Schmall 78

2. Where the damage to personal property is such that it cannot be repaired and the property thereby restored to substantially its condition immediately before the damage occurred, or when the reasonable cost of repair exceeds the difference in market value of the property immediately before and immediately after the injury, the measure of damages is the lost market value plus the reasonable value of the loss of use of the property for the reasonable amount of time required to obtain a suitable replacement.
Chlopek v. Schmall 78

3. The reasonable value of the loss of use of personal property is generally the fair rental value of property of a like or similar nature or the amount actually paid for rental, whichever is less.
Chlopek v. Schmall 78

4. Where property used for commercial or business purposes cannot be rented, then loss of profits may establish the reasonable value of the loss of use.
Chlopek v. Schmall 78

5. To the extent that any prior cases would limit the total compensation for damage to personal property to the fair market value of the property immediately before the injury, they are expressly overruled.
Chlopek v. Schmall 78

6. In an action for fraud a party may recover such damages as will compensate him for the loss or injury actually caused by the fraud and will place him in the same position as he would have been in had the fraud not occurred.
Forker Solar, Inc. v. Knoblauch 143

7. The plaintiff must present sufficient evidence to allow the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness.
Kahl v. Frederick 212
8. The general measure of damages for a breach of contract to convey land is the difference between the market value of the land at the time of the breach and the price set out in the contract.
Turner v. Alberts 632
9. The exception to the general rule is that where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made.
Turner v. Alberts 632
10. Where the plaintiff claims damages for lost wages, and the trial court instructs the jury that the plaintiff can recover damages for wages lost due to the inability of the plaintiff to work, it is not error to refuse to instruct that the plaintiff has a duty to mitigate damages.
Beatty v. Davis 663
11. Impairment of earning capacity is an item of general damage, and proof may be had under general allegations of injury and damage. Proof of an actual loss of wages or earnings is not essential to a recovery for loss of earning capacity.
Chirnside v. Lincoln Tel. & Tel. Co. 784
12. Only damages for physical injury may be recovered under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982).
Naidoo v. Union Pacific Railroad 853

Death Penalty

1. The proportionality of a death sentence is for court determination and is not a subject for expert testimony.
State v. Palmer 282
2. A defendant may offer any evidence on the issue of mitigation, even though the mitigating factor is not specifically listed in Neb. Rev. Stat. § 29-2523(2) (Reissue 1985).
State v. Palmer 282
3. The statutory aggravating circumstances set out in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) are not unconstitutionally vague.
State v. Palmer 282
4. There is no constitutional requirement that the death penalty be imposed by a jury.
State v. Palmer 282
5. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), that a murder be "especially heinous, atrocious, cruel" or "manifest exceptional depravity by ordinary standards of morality and intelligence," describes in the disjunctive at least two distinct components of the

aggravating circumstance which may operate in conjunction with or independent of one another.
State v. Palmer 282

6. The presence of any of the components of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) will sustain a finding that aggravating circumstance (1)(d) exists.
State v. Palmer 282

7. The words "especially heinous, atrocious, cruel," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), mean a conscienceless or pitiless crime which is unnecessarily torturous to the victim.
State v. Palmer 282

8. The phrase "exceptional depravity," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), refers and pertains to the state of mind of the actor and may be proved by or inferred from the defendant's conduct at or near the time of the offense.
State v. Palmer 282

9. For the purpose of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), "exceptional depravity" exists when the act is totally and senselessly bereft of any regard for human life as shown by the presence of the following circumstances, either separately or collectively: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim.
State v. Palmer 282

10. The proportionality review made under the requirements of Neb. Rev. Stat. §§ 29-2521.01, 29-2521.02, and 29-2521.03 (Reissue 1985) is limited to a comparison of the facts and circumstances of the death penalty-imposed case under review with those of all applicable cases in which the death penalty was imposed.
State v. Palmer 282

11. Neb. Rev. Stat. § 29-2006(3) (Reissue 1985) held constitutional.
State v. Burchett 444

12. Prospective jurors who are unable to fairly determine guilt because of their opposition to capital punishment are not a cognizable group.
State v. Burchett 444

13. In a prosecution for first degree murder, the State may use peremptory challenges to remove jurors who are opposed to the death penalty.
State v. Burchett 444

Debtors and Creditors

1. In order that a confession of judgment may be binding on the plaintiff, it is essential that he, either expressly or impliedly, assent

thereto; if it is made without his request, knowledge, or consent, and entered at the instance of the debtor alone, it will have no validity unless the creditor ratifies or accepts it.
In re Estate of Redpath 845

2. A bank may set off the funds of a depositor to pay a debt due the bank from the depositor, and, absent an agreement to the contrary or specific instructions from the debtor, a creditor may apply the proceeds to such debts and in such order as the creditor determines.
First Nat. Bank v. Benedict Consol. Indus. 860

Decedents' Estates

1. The cardinal rule concerning a decedent's will is the requirement that the intention of the testator or testatrix shall be given effect, unless the maker of the will attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy.
In re Estate of Walker 812

2. To arrive at a testator's or testatrix's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in a will, employ the generally accepted literal and grammatical meaning of words used in the will, and assume that the maker of the will understood words stated in the will.
In re Estate of Walker 812

Default Judgments

1. Factors to be considered in determining whether a trial court abused its discretion in rendering a default judgment include the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings.
Forker Solar, Inc. v. Knoblauch 143

2. One who seeks to set aside a default judgment against him must show that neither he nor his attorney was negligent in failing to appear and defend.
Forker Solar, Inc. v. Knoblauch 143

3. A judgment will not be set aside on the application of a party who has, by his own laches, failed to avail himself of an opportunity to defend.
Forker Solar, Inc. v. Knoblauch 143

Demurrer

For the purpose of ruling on a demurrer, the court accepts well-pleaded facts in the petition, as distinguished from the conclusions alleged, as true.
Knoell v. Huff 90

Directed Verdict

1. A directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence, that is, when the controversy is properly resolved as a matter of law.
   Vice v. Darm Corp. 1

2. In considering a motion for a directed verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.
   Vice v. Darm Corp. 1

3. A motion to dismiss a criminal complaint at the close of the State's evidence can only be granted if there was a total failure of competent proof to support the existence of a material element of the alleged crime or if the testimony adduced was of so weak or doubtful a character that a conviction based thereon could not be sustained.
   State v. Pribil 28
   State v. Kane 245
   State v. Clancy 492
   State v. Hunt 594

Discrimination

In a discrimination suit brought under the provisions of Neb. Rev. Stat. § 48-1104 (Reissue 1984) of the Nebraska Fair Employment Practice Act, the following is the procedure to be followed in presentation of evidence relevant to a question about discrimination against a disabled person: First, the complainant has the burden of proving a prima facie case of discrimination. Second, if the complainant succeeds in proving that prima facie case, the burden shifts to the respondent to articulate some legitimate, nondiscriminatory reason for the complainant's rejection or discharge from employment. Third, should the respondent carry the burden, the complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the respondent were not its true reasons, but were a pretext for discrimination.
Father Flanagan's Boys' Home v. Goerke 731

Divorce

1. An unambiguous antenuptial agreement which neither expressly nor by reasonable implication indicates an intention of the parties that it be valid upon divorce shall not be valid and binding upon the dissolution of marriage.
   Busekist v. Busekist 510

2. One who proves he or she met the durational residency requirement for jurisdiction in divorce proceedings set out in Neb. Rev. Stat. § 42-349 (Reissue 1984) shall be permitted the inference that such residency was with the intention to make Nebraska a permanent home, absent a showing that the residency was a sham and not bona fide.
Rector v. Rector 800

Domicile

One who proves he or she met the durational residency requirement for jurisdiction in divorce proceedings set out in Neb. Rev. Stat. § 42-349 (Reissue 1984) shall be permitted the inference that such residency was with the intention to make Nebraska a permanent home, absent a showing that the residency was a sham and not bona fide.
Rector v. Rector 800

Double Jeopardy

Retrial after reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute double jeopardy.
State v. Palmer 282

Drunk Driving

1. Just as a wrong date in an information will not preclude a defendant from being sentenced as a habitual criminal if the record discloses the defendant could not have been misled or confused, so, too, a wrong date in a complaint will not preclude a defendant from being sentenced as one who has previously been convicted of driving while under the influence of alcohol if the record discloses that the defendant could not have been misled or confused.
State v. Jameson 38
2. Circumstantial evidence may establish the operation or actual physical control of a motor vehicle, under the provisions of Neb. Rev. Stat. § 39-669.07 (Reissue 1984).
State v. Baker 130
3. An alcohol-related violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984) may be proved by establishing that one was in actual physical control of a motor vehicle while under the influence of alcohol or that one was in actual physical control of a motor vehicle while having ten-hundredths of 1 percent by weight of alcohol in his or her body fluid.
State v. Burling 725
4. As used in Neb. Rev. Stat. § 39-669.07 (Reissue 1984), the phrase "under the influence of alcoholic liquor" means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner.
State v. Burling 725

Due Process

1. Notwithstanding constitutional mandates regarding a jury trial, such as the sixth amendment to the U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution, there is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of imprisonment of 6 months or less.
   State v. Kennedy 164
2. The U.S. Constitution, through the due process clause of the 14th amendment, requires the states to provide a trial by jury whenever the 6th amendment would so require if the case were in federal court.
   State v. Bishop 522
   State v. Lafler 613
3. An essential purpose of a penal statute is to provide notice to the ordinary person concerning conduct which is proscribed as criminal. When a penal statute supplies an ordinary person with notice concerning conduct forbidden as criminal, such statute meets the constitutional standard of due process.
   State v. Copple 672
4. The opportunity to be heard is a fundamental aspect of due process.
   In re Interest of A.W. 764

Effectiveness of Counsel

1. The test of effective assistance of counsel involves a two-part determination: first, counsel must perform at least as well as an attorney in that area with ordinary skill in criminal law, and second, the attorney must conscientiously protect the client's interests. The defendant must also demonstrate how the absence of counsel's error would have changed the result in the case.
   State v. Evans 64
   State v. Williams 114
2. The decision as to whether to call a witness is a matter of trial strategy within counsel's judgment.
   State v. Evans 64
3. As a result of Neb. Const. art. I, § 11, and U.S. Const. amend. VI, the right to counsel is the right to effective assistance of counsel. For effective assistance of counsel a defendant is constitutionally entitled to a lawyer's representation free from conflicting interests.
   State v. Williams 114
4. In cases of alleged ineffective assistance of counsel, prejudice has been characterized as a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
   State v. Williams 114

5. There is a presumption of prejudice involving a defendant's constitutional right to effective assistance of counsel when a defendant demonstrates (1) counsel actively represented conflicting interests and (2) an actual conflict of interest adversely affected performance by the defendant's lawyer. Such conflicts of interest must be shown to have resulted in counsel's conduct detrimental to the defense.
State v. Williams 114
6. To establish ineffectiveness of counsel as a ground for postconviction relief, the defendant must prove that his counsel failed to perform at least as well as an attorney in the area with ordinary training and skill in the criminal law.
State v. Fries 482
7. It is the duty of defense counsel to represent their clients in a manner consistent with the prevailing professional standard within their community. Implicit in that duty is a duty to conscientiously protect the interests of the client—a duty which is an integral part of every attorney-client relationship.
State v. Fries 482
8. To obtain postconviction relief on the ground of ineffectiveness of counsel, the defendant must show that counsel's action or inaction prejudiced the defense of the case and that there is a reasonable probability that, but for counsel's errors, the result of the case would have been different.
State v. Fries 482
9. The decision to call, or not to call, a particular witness is a matter of trial strategy. Even if that choice proves ineffective, it will not, without more, sustain a finding of ineffectiveness of counsel.
State v. Fries 482
10. When a defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
State v. Lytle 486
11. In claiming ineffective assistance of counsel because counsel failed to obtain a plea concession, the defendant must allege facts which, if true, would establish that such a plea negotiation was reasonably possible.
State v. Lytle 486
12. Multiple representation does not give rise to a denial of the defendant's sixth amendment right to effective assistance of counsel unless an actual conflict of interest exists and that conflict

affects the performance of counsel.
State v. Wilson 721

Employer and Employee

1. An action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982), may be based on the theory of respondeat superior or on a theory of direct negligence.
Naidoo v. Union Pacific Railroad 853

2. Only damages for physical injury may be recovered under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982).
Naidoo v. Union Pacific Railroad 853

Employment Contracts

The wage rate is to be computed according to the contract of hire in force at the time of the accident.
Hayes v. A.M. Cohron, Inc. 579

Employment Security Law

1. For the purpose of determining unemployment tax liability, the common-law definition of an independent contractor is superseded by the definition found in Neb. Rev. Stat. § 48-604(5) (Reissue 1984).
Commissioner of Labor v. Lyric Co. 190

2. In an appeal regarding disqualification of benefits under Neb. Rev. Stat. § 48-628(b) (Reissue 1984), the Supreme Court retries factual questions de novo on the record and reaches conclusions independent of those reached by the district court.
O'Keefe v. Tabitha, Inc. 574

3. While absences due to illness may not constitute an employee's misconduct, an employee's chronic and excessive absenteeism demonstrates a wanton and willful disregard of the employer's interests for the purpose of Neb. Rev. Stat. § 48-628(b) (Reissue 1984).
O'Keefe v. Tabitha, Inc. 574

4. A labor contract is irrelevant to the determination of the existence of misconduct, because, generally, private labor agreements may not render an unemployment compensation law ineffectual.
O'Keefe v. Tabitha, Inc. 574

5. Neb. Rev. Stat. § 48-627 (Cum. Supp. 1986) describes the weekly requirements for continuing to be eligible for unemployment compensation benefits. It is not concerned with reasons why a claimant became unemployed or with threshold questions of eligibility.
Ponderosa Villa v. Hughes 627

6. The result of finding a claimant "unavailable for work" under Neb. Rev. Stat. § 48-627(c) (Cum. Supp. 1986) is to disqualify the

claimant from unemployment benefits only for the week he or she was unavailable.
Ponderosa Villa v. Hughes 627

7. Neb. Rev. Stat. § 48-628(c) (Cum. Supp. 1986) applies when an unemployed person refuses an offer of suitable work and chooses to remain unemployed, and is not applicable when an employed person voluntarily leaves over a change in working conditions.
Ponderosa Villa v. Hughes 627

8. The correct inquiry when an employed person refuses a demotion and leaves is whether good cause existed to voluntarily sever the employment relationship. Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986).
Ponderosa Villa v. Hughes 627

9. In appeals under Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986), we review the causes de novo on the record, retry the issues of fact, and come to independent conclusions regarding the findings challenged.
Ponderosa Villa v. Hughes 627

10. To avoid disqualification under Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986), the employee who voluntarily severed the employment relationship has the burden of proving that the leaving was with good cause.
Ponderosa Villa v. Hughes 627

11. Where the terms of a demotion, not the result of employee misconduct, substantially changed almost every aspect of an employee's job to her detriment, good cause existed to leave.
Ponderosa Villa v. Hughes 627

Escape

Nebraska's escape statute, Neb. Rev. Stat. § 28-912 (Reissue 1985), defines one offense and sets out factors which, if present, change the range of the penalty.
State v. Heathman 19

Estoppel

A person who contracts with a corporation is estopped from later denying its corporate existence.
Forker Solar, Inc. v. Knoblauch 143

Evidence

1. To be admissible as evidence in his trial, an accused's statements must have been voluntarily made and must not have been the product of any inducement, no matter how slight.
State v. Bowersmith 6

2. Ordinarily, the overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve error.
State v. Borchardt 47

3. Evidence of a test result cannot be characterized as "scientific" or

qualify as "technical or other specialized knowledge," and thus within the purview of Neb. Rev. Stat. § 27-702 (Reissue 1985), unless and until it is established that the test result demonstrates what it is claimed to demonstrate.
State v. Borchardt 47

4. In resolving a challenge to the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such is for the trier of fact and must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Borchardt 47
State v. Baker 130

5. Generally, as a practical matter, no criminal investigation is complete until sufficient facts have been obtained to justify the arrest and conviction of the defendant.
State v. Nissen 60

6. In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985) for postconviction relief, the trial judge, as the "trier of fact," resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony.
State v. Williams 114

7. What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Neb. Evid. R. 801(4)(a)(i) are satisfied. Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985).
State v. Williams 114

8. Subject to the exception specified in Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)), a witness' inconsistent statement may be admissible evidence to aid the jury in evaluating that witness' credibility, but a witness' inconsistent statement is not substantive evidence of the matter asserted unless such statement is otherwise admissible under the Nebraska Evidence Rules.
State v. Williams 114

9. The admission or exclusion of evidence is a matter left largely to the sound discretion of the trial judge.
State v. Kern 177

10. In second degree murder cases malice and intent may be inferred from the evidence relating to the circumstances of the criminal act.
State v. Moniz 198

11. An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the

truth of some alleged fact has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted, so that the one party need offer no evidence to prove it and the other is not allowed to disprove it.
State v. Davis 205
12. A concession or stipulation as to a fact made for the purpose of trial has the force and effect of an established fact, binding on the party making the same as well as on the court, unless the court in its reasonable discretion allows the concession to be later withdrawn, explained, or modified if it appears to have been made by improvidence or mistake.
State v. Davis 205
13. Parties are bound by stipulations voluntarily made, and relief from such stipulations after judgment is warranted only under exceptional circumstances.
State v. Davis 205
14. An accused may by stipulation waive the necessity of proof of all or any part of the case which the State has alleged against him and having done so, he cannot complain of evidence which he has stipulated into the record.
State v. Davis 205
15. The plaintiff must present sufficient evidence to allow the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness.
Kahl v. Frederick 212
16. The receipt of evidence which may later be excluded because of a difficult or complicated rule of law does not constitute judicial misconduct.
State v. Palmer 282
17. A defendant may offer any evidence on the issue of mitigation, even though the mitigating factor is not specifically listed in Neb. Rev. Stat. § 29-2523(2) (Reissue 1985).
State v. Palmer 282
18. In a prosecution for a crime of violence, the defendant's spouse may be called to testify against the defendant as to any matter, including confidential communications. Neb. Rev. Stat. § 27-505(3)(a) (Reissue 1985).
State v. Burchett 444
19. An accomplice's testimony is admissible notwithstanding the fact that the testimony is procured by means of a plea bargain.
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20. The promise of leniency or otherwise favorable prosecutorial treatment goes only to the credibility of the accomplice's testimony, not to its admissibility.
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21. Generally, it is only where the prosecution has bargained for false

or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require its preclusion.
State v. Burchett 444

22. Determinations as to the qualifications of a person to be a witness or the admissibility of evidence are matters left to the sound discretion of the trial court, whose rulings will not be upset absent an abuse of discretion.
State v. Burchett 444
State v. Clancy 492

23. One alleging negligence has the burden to prove such negligence. Establishing that an accident has occurred does not prove a case of negligence. Negligence is not presumed and must be proved by evidence, direct or circumstantial.
Holden v. Urban 472

24. Evidence obtained in the implied consent context is not testimonial or communicative and does not fall within the privilege against self-incrimination.
State v. Bishop 522

25. A demurrer ore tenus is an objection to the receipt of evidence.
Lease Northwest v. Davis 617

26. A photocopy of a writing is admissible in evidence to the same extent as the original unless a genuine question is raised as to the authenticity of the original or, under the circumstances, it would be unfair to admit the duplicate in lieu of the original. The burden of raising an issue as to the authenticity of the original or the unfairness of the circumstances is on the party opposing admission.
State v. Frederiksen 653

27. The doctrine of res ipsa loquitur is that where the instrumentality causing the injury is shown to be under the defendant's exclusive control and management and the accident is one that in the ordinary course of things does not occur if those who have its management or control use proper care, reasonable evidence is afforded, in the absence of an explanation by the defendant, that the accident arose from want of proper care.
Beatty v. Davis 663

28. If specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable.
Beatty v. Davis 663

29. At a hearing to determine whether the State had violated its agreement for immunity and restricted evidence or information, the State must present a prima facie case that it has fulfilled its agreement with the defendant, that is, demonstrate that the State's evidence, to be adduced at the defendant's trial, was obtained from a source or sources independent of the defendant and not by direct or indirect use of information obtained from the defendant

as the result of defendant's agreement for immunity and restricted evidence or information.
State v. Copple 672

30. Prima facie proof of a case is less stringent than proof by a preponderance of the evidence. A "prima facie" case requires only enough evidence to take the question to the jury, whereas "preponderance of the evidence" requires proof which leads the jury to find the existence of the contested fact is more probable than its nonexistence.
State v. Copple 672

31. If a prosecutor has a duty to disclose a statement in response to a general discovery request, it must derive from the obviously exculpatory character of the evidence.
State v. Tweedy 715

32. In order for an omitted statement to be considered material, it must create a reasonable doubt as to the defendant's guilt that did not otherwise exist. That the evidence "might" influence the outcome is insufficient.
State v. Tweedy 715

33. Where omitted evidence would have been cumulative and repetitive, the defendant suffered no prejudice because of the omission.
State v. Tweedy 715

34. When the sufficiency of the evidence as to criminal intent is questioned, the law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
State v. Tweedy 715

35. "Competent evidence" is that which tends to establish the fact in issue; that which is admissible and relevant on the point in issue.
State v. Burling 725

36. Determining whether evidence, if believed, is sufficient to sustain a conviction is a judicial function.
State v. Burling 725

37. The Legislature may not declare the weight to be given to evidence or what evidence shall be conclusive proof of an issue of fact.
State v. Burling 725

38. Whether evidence is of probative value is a legal question, the judicial analysis and resolution of which the Legislature cannot impair.
State v. Burling 725

39. In viewing a matter on appeal we are guided by the rule that where evidence is in conflict or reasonable minds may differ, it is normally within the province of the jury to decide issues of fact.
Chirnside v. Lincoln Tel. & Tel. Co. 784

40. One who claims the existence of a constructive trust has the burden of proof to establish the existence of a constructive trust by evidence which is clear, satisfactory, and convincing in character.
In re Estate of Redpath 845
41. The transcript of the proceeding before a mental health board may not be treated as evidence before the board, the district court, or this court unless the facts in the transcript are offered as evidence, are not objected to, and are reviewed by the trier of fact.
In re Interest of Kinnebrew 885
42. In a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal.
State v. Pointer 892
State v. Roggenkamp 914
43. If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error.
State v. Roggenkamp 914
44. A party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with such stipulation.
State v. Roggenkamp 914

Expert Witnesses

1. The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.
State v. Borchardt 47
2. The proportionality of a death sentence is for court determination and is not a subject for expert testimony.
State v. Palmer 282
3. The meaning of words used by medical experts at times presents a problem of interpretation which may be resolved by the sense in which they were used.
Hayes v. A.M. Cohron, Inc. 579
4. Whether a witness is qualified as an expert is a preliminary question for a trial court. Neb. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)). Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion.
State v. Copple 672
5. When the record presents nothing more than conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workers' Compensation Court.
Ward v. City of Mitchell 711

6. Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion, and where the opinion is based on the facts shown not to be true the opinion lacks probative value.
Latek v. K Mart Corp. 807
7. In proving the dangerousness of a mentally ill person as manifested by "evidence of inability to provide for his basic human needs," within the meaning of Neb. Rev. Stat. § 83-1009(2) (Cum. Supp. 1986), expert testimony may be used to prove such a condition.
In re Interest of Kinnebrew 885

Fair Employment Practices

1. In a discrimination suit brought under the provisions of Neb. Rev. Stat. § 48-1104 (Reissue 1984) of the Nebraska Fair Employment Practice Act, the following is the procedure to be followed in presentation of evidence relevant to a question about discrimination against a disabled person: First, the complainant has the burden of proving a prima facie case of discrimination. Second, if the complainant succeeds in proving that prima facie case, the burden shifts to the respondent to articulate some legitimate, nondiscriminatory reason for the complainant's rejection or discharge from employment. Third, should the respondent carry the burden, the complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the respondent were not its true reasons, but were a pretext for discrimination.
Father Flanagan's Boys' Home v. Goerke 731
2. Under Neb. Rev. Stat. § 48-1101 (Reissue 1984), "disability" designates a protected class regarding employment in Nebraska. By virtue of Neb. Rev. Stat. § 48-1102(8) (Reissue 1984), "epilepsy" is included within the definition of a "disability," but only if such epilepsy is "unrelated to such person's ability to engage in a particular occupation."
Father Flanagan's Boys' Home v. Goerke 731

False Imprisonment

Merchants cannot claim protection from civil liability in accord with Neb. Rev. Stat. § 29-402.01 (Reissue 1985) where the detention of a suspected shoplifter was unreasonable because it continued after the detainers knew that their suspicions were groundless and that they had made a mistake.
Latek v. K Mart Corp. 807

False Reporting

1. The language of Neb. Rev. Stat. § 28-907(1)(a) (Reissue 1985), "to impede the investigation of an actual criminal matter," includes

the impeding of the gathering of information as to the identity of a defendant named in an arrest warrant.
State v. Nissen 60
2. Law enforcement officers have a legitimate right to question persons about the identity of the subject of an arrest warrant before they arrest the suspect; and although persons so questioned may have the right to refuse to answer such inquiry, if they choose to answer they may not give false information without subjecting themselves to criminal liability.
State v. Nissen 60
3. To commit the crime of false reporting one need not actually impede a police investigation, but must furnish false information with the intent to impede the investigation of a criminal matter.
State v. Gonzales 659

Final Orders

1. This court will not interfere on appeal with a final order made by the district court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof.
State v. Steele 476
2. A decree of foreclosure is a final order for purposes of appeal to this court.
Leseberg v. Meints 533

Foreclosure

1. A decree of foreclosure is a final order for purposes of appeal to this court.
Leseberg v. Meints 533
2. The time for redemption, as such phrase is used in Neb. Rev. Stat. § 77-1902 (Reissue 1986), is the 3 years immediately following a delinquent tax sale. An action to foreclose a tax lien pursuant to § 77-1902 can only be brought within the 90 days immediately after expiration of the time for redemption.
County of Lancaster v. Maser 566

Fraud

1. The elements of fraud are (1) a false representation of material fact, (2) knowledge that the representation was false or made in reckless disregard as to its truthfulness or falsity, (3) an intent to induce another to act, (4) a justifiable reliance on the representation, and (5) injury or damage resulting from such reliance.
Knoell v. Huff 90
2. To maintain an action for damages for false representations, the plaintiff must allege and prove, by a preponderance of evidence, the following elements: (1) that a representation was made; (2) that the representation was false; (3) that the representation was

known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely on it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damage as a result.
Forker Solar, Inc. v. Knoblauch 143
Nelson v. Cheney 756

3. A person is justified in relying upon a representation made to him as a positive statement of fact, when an investigation would be required to ascertain its falsity.
Forker Solar, Inc. v. Knoblauch 143

4. In an action for fraud a party may recover such damages as will compensate him for the loss or injury actually caused by the fraud and will place him in the same position as he would have been in had the fraud not occurred.
Forker Solar, Inc. v. Knoblauch 143

5. Neb. Rev. Stat. §§ 44-515 to 44-521 (Reissue 1984) do not prevent an insurer from rescinding an automobile liability insurance policy for material misrepresentations made by the insured in the application for the policy.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

6. Neb. Rev. Stat. § 44-358 (Reissue 1984) limits but does not eliminate the right of an insurer to rescind an automobile liability insurance policy for fraud in the application.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

7. An accident resulting in injury or damage to a third person does not destroy the right of an insurer to rescind an automobile liability insurance policy for fraud in the application.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

8. In order to maintain an action for damages for fraudulent concealment or false representation by suppression or concealment in the vendor/purchaser setting, the plaintiff must allege and prove by a preponderance of the evidence the following elements: (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.
Nelson v. Cheney 756

Good Cause

1. The correct inquiry when an employed person refuses a demotion and leaves is whether good cause existed to voluntarily sever the

employment relationship. Neb. Rev. Stat. § 48-628(a)(I) (Cum. Supp. 1986).
Ponderosa Villa v. Hughes 627
2. To avoid disqualification under Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986), the employee who voluntarily severed the employment relationship has the burden of proving that the leaving was with good cause.
Ponderosa Villa v. Hughes 627
3. Where the terms of a demotion, not the result of employee misconduct, substantially changed almost every aspect of an employee's job to her detriment, good cause existed to leave.
Ponderosa Villa v. Hughes 627

Guaranty

1. A guarantee who holds an unconditional guaranty has no obligation to proceed against the security prior to seeking recovery under the guaranty contract.
Lease Northwest v. Davis 617
2. The modification of a guaranty of such a nature as would substantially change the liability of the parties is an affirmative defense which must be pled.
Lease Northwest v. Davis 617
3. A guarantor is not discharged by an extension of time for payment or performance of the principal obligation if he consents thereto, as where the contract of guaranty expressly or impliedly provides for the extension.
First Nat. Bank v. Benedict Consol. Indus. 860
4. With an unconditional guaranty of payment, the holder is not required to first seek collection or satisfaction against the maker, but is authorized to go directly against the guarantors.
First Nat. Bank v. Benedict Consol. Indus. 860

Habeas Corpus

1. A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court.
Gaughan v. Gilliam 836
2. A question present in every habeas corpus case for custody of a child is the welfare and best interests of the child.
Gaughan v. Gilliam 836

Hearsay

1. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the witness' testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)).
State v. Williams 114

2. What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Neb. Evid. R. 801(4)(a)(i) are satisfied. Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985).
State v. Williams 114

3. "(1) A statement is (a) an oral or written assertion or (b) nonverbal conduct of a person if it is intended by him as an assertion. . . . (3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Evid. R. 801 (Neb. Rev. Stat. § 27-801 (Reissue 1985)).
State v. Copple 672

Highways

A driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway. After having stopped, such driver shall yield the right-of-way to any vehicle which is approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves his vehicle into or across such intersection.
Chlopek v. Schmall 78

Homicide

1. Premeditation, or the design and purpose to kill, exists when the intent to kill is formed before the act causing the death, and not merely simultaneously with that act.
State v. Kern 177

2. No particular length of time is required in order for premeditation to exist; the time used in premeditating may be so short as to be instantaneous, and the intent to kill may be formed at any moment before the killing.
State v. Kern 177

3. Where first degree murder is charged, the elements of both premeditation and intent are for the jury.
State v. Kern 177

4. One who knows he or she may retreat with complete safety may not resort to the use of deadly force in self-defense.
State v. Moniz 198

5. In second degree murder cases malice and intent may be inferred from the evidence relating to the circumstances of the criminal act.
State v. Moniz 198

6. In a prosecution for first degree murder, the State may use peremptory challenges to remove jurors who are opposed to the death penalty.
State v. Burchett 444

7. Prosecutions for felonies, including murder, may be had on informations filed by the county attorney.
State v. Burchett 444

Hypnosis

A witness is not rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case. Such a witness may testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis.
State v. Palmer 282

Identification Procedures

1. The right to counsel at a police lineup attaches only at or after the time when adversary judicial proceedings have been initiated against the defendant by way of complaint, indictment, or information.
State v. Evans 64

2. Each case must be considered on its own facts, and convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
State v. Palmer 282

3. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
State v. Palmer 282

Impeachment

What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Neb. Evid. R. 801(4)(a)(i) are satisfied. Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985).
State v. Williams 114

Implied Consent

1. There is no requirement in this jurisdiction that *Miranda* warnings be given prior to a request to submit to a chemical test of blood, breath, or urine.
   State v. Bishop 522
2. Under the implied consent law, a driver is not entitled to consult with an attorney, nor is a delay in the test required should a driver request to consult with an attorney.
   State v. Bishop 522
3. Evidence obtained in the implied consent context is not testimonial or communicative and does not fall within the privilege against self-incrimination.
   State v. Bishop 522

Immunity

At a hearing to determine whether the State had violated its agreement for immunity and restricted evidence or information, the State must present a prima facie case that it has fulfilled its agreement with the defendant, that is, demonstrate that the State's evidence, to be adduced at the defendant's trial, was obtained from a source or sources independent of the defendant and not by direct or indirect use of information obtained from the defendant as the result of defendant's agreement for immunity and restricted evidence or information.
State v. Copple 672

Independent Contractor

For the purpose of determining unemployment tax liability, the common-law definition of an independent contractor is superseded by the definition found in Neb. Rev. Stat. § 48-604(5) (Reissue 1984).
Commissioner of Labor v. Lyric Co. 190

Indictments and Informations

1. The nature of the crime charged in the information must be such as to give the defendant notice that he or she could at the same time face the lesser-included offense charge.
   State v. Pribil 28
2. Just as a wrong date in an information will not preclude a defendant from being sentenced as a habitual criminal if the record discloses the defendant could not have been misled or confused, so, too, a wrong date in a complaint will not preclude a defendant from being sentenced as one who has previously been convicted of driving while under the influence of alcohol if the record discloses that the defendant could not have been misled or confused.
   State v. Jameson 38

3. The right to counsel at a police lineup attaches only at or after the time when adversary judicial proceedings have been initiated against the defendant by way of complaint, indictment, or information.
State v. Evans 64

4. A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional, except the defense that the indictment, information, or complaint is not sufficient to charge an offense.
State v. Kennedy 164

5. Prosecutions for felonies, including murder, may be had on informations filed by the county attorney.
State v. Burchett 444

Innkeepers

The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm.
Vice v. Darm Corp. 1

Insurance

1. The cancellation of an insurance policy is not a rescission, since a rescission avoids the contract ab initio. A cancellation merely terminates the policy as of the time when the cancellation becomes effective.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

2. Unless a cancellation statute is manifestly all-inclusive, a statute specifying the instances under which a party to an insurance contract may cancel it does not make cancellation the exclusive remedy, and it is not in derogation of other remedial rights which are recognized and implemented by other provisions of law.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

3. Neb. Rev. Stat. §§ 44-515 to 44-521 (Reissue 1984) do not prevent an insurer from rescinding an automobile liability insurance policy for material misrepresentations made by the insured in the application for the policy.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

4. Neb. Rev. Stat. § 44-358 (Reissue 1984) limits but does not eliminate the right of an insurer to rescind an automobile liability

insurance policy for fraud in the application.
Glockel v. State Farm Mut. Auto. Ins. Co. 598
5. An accident resulting in injury or damage to a third person does not destroy the right of an insurer to rescind an automobile liability insurance policy for fraud in the application.
Glockel v. State Farm Mut. Auto. Ins. Co. 598
6. Some act or conduct amounting to a recognition of the continued validity of an insurance policy as a binding obligation upon an insurer is necessary to constitute an effective waiver of the policy provision for forfeiture for nonpayment of premiums.
Bohannon v. Guardsman Life Ins. Co. 701
7. An insurer, with full knowledge of the nonpayment of a monthly premium, which nevertheless demands and receives payment of the premium for the succeeding month, may have waived the policy provision for forfeiture for nonpayment of the preceding monthly premium.
Bohannon v. Guardsman Life Ins. Co. 701
8. An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made.
Waylett v. United Servs. Auto. Assn. 741
9. An insurance policy is to be construed as any other contract; if its terms are clear, they are to be applied according to their plain and ordinary meaning.
Waylett v. United Servs. Auto. Assn. 741
10. The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.
Waylett v. United Servs. Auto. Assn. 741

Intent

1. Intent is the state of mind operative at the time of an action.
State v. Robb 14
2. Intent may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his or her conduct.
State v. Robb 14
3. The law presumes that one of sound mind intends the obvious and probable consequences of his or her voluntary acts.
State v. Robb 14
4. No exact limitation of time can be fixed as to when evidence of other crimes, wrongs, or acts tending to prove intent to commit the offense charged is remote.
State v. Kern 177
5. Premeditation, or the design and purpose to kill, exists when the intent to kill is formed before the act causing the death, and not merely simultaneously with that act.
State v. Kern 177

6. No particular length of time is required in order for premeditation to exist; the time used in premeditating may be so short as to be instantaneous, and the intent to kill may be formed at any moment before the killing.
State v. Kern 177

7. Where first degree murder is charged, the elements of both premeditation and intent are for the jury.
State v. Kern 177

8. An unambiguous antenuptial agreement which neither expressly nor by reasonable implication indicates an intention of the parties that it be valid upon divorce shall not be valid and binding upon the dissolution of marriage.
Busekist v. Busekist 510

9. To commit the crime of false reporting one need not actually impede a police investigation, but must furnish false information with the intent to impede the investigation of a criminal matter.
State v. Gonzales 659

10. When the sufficiency of the evidence as to criminal intent is questioned, the law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
State v. Tweedy 715

11. An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made.
Waylett v. United Servs. Auto. Assn. 741

12. One who proves he or she met the durational residency requirement for jurisdiction in divorce proceedings set out in Neb. Rev. Stat. § 42-349 (Reissue 1984) shall be permitted the inference that such residency was with the intention to make Nebraska a permanent home, absent a showing that the residency was a sham and not bona fide.
Rector v. Rector 800

13. The cardinal rule concerning a decedent's will is the requirement that the intention of the testator or testatrix shall be given effect, unless the maker of the will attempts to accomplish a purpose, or to make a disposition, contrary to some rule of law or public policy.
In re Estate of Walker 812

14. To arrive at a testator's or testatrix's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in a will, employ the generally accepted literal and grammatical meaning of words used in the will, and assume that the maker of the will understood words stated in the will.
In re Estate of Walker 812

15. A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.
In re Estate of Redpath 845

Interest

Where the parties have contracted for the payment of a particular lawful rate of interest, such contract controls and the rate thus fixed is recoverable in accordance with the terms of the contract.
Lease Northwest v. Davis 617

Joint Accounts

1. If the trustee makes a withdrawal from the mixed account for an admittedly personal purpose, for example, to pay his living expenses or his individual debts, or for an unknown purpose, such withdrawal will be charged to the personal part of the account as long as there remains any cash or credit in such personal portion of the account. It will be only after the personal credit or cash is exhausted that withdrawals for personal or unknown purposes will be charged to the trust side of the account.
In re Estate of Redpath 845

2. A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.
In re Estate of Redpath 845

Judges

1. The receipt of evidence which may later be excluded because of a difficult or complicated rule of law does not constitute judicial misconduct.
State v. Palmer 282

2. Neb. Rev. Stat. § 24-519 (Reissue 1985) expressly denies to an associate county judge who is not an attorney at law the power to construe a will.
In re Estate of Walker 812

Judgments

1. The findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
Chlopek v. Schmall 78
Marathon Realty Corp. v. Gavin 458

2. Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm.
Kahl v. Frederick 212

3. If a lower court does not have subject matter jurisdiction and, therefore, has no power to entertain the proceedings or decide a question, an appellate court lacks jurisdiction to review or evaluate an evidentiary determination for an act outside the jurisdiction of the court whose judgment or order is appealed.
In re Interest of L.D. et al. 249
4. Although an extrajurisdictional act of a lower court cannot vest the appellate court with jurisdiction to review or evaluate an evidentiary determination involved in such act, an appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or final order sought to be reviewed.
In re Interest of L.D. et al. 249
5. On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the case for error appearing on the record made in the county court.
Holden v. Urban 472
6. A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous.
Holden v. Urban 472
7. A judgment is the final consideration and determination of a court on matters submitted to it in an action or proceeding.
Black v. Sioux City Foundry Co. 824
8. In order that a confession of judgment may be binding on the plaintiff, it is essential that he, either expressly or impliedly, assent thereto; if it is made without his request, knowledge, or consent, and entered at the instance of the debtor alone, it will have no validity unless the creditor ratifies or accepts it.
In re Estate of Redpath 845

Juries

1. To secure a change of venue the defendant must show that pretrial publicity has made it impossible to secure a fair and impartial jury.
State v. Heathman 19
2. Witness credibility and the weight to be given a witness' testimony are matters for evaluation and determination by the jury.
State v. Williams 114
3. There is no constitutional requirement that the death penalty be imposed by a jury.
State v. Palmer 282
4. Lack of jury members of the same race as the defendant, standing alone, does not support a claim of improper racial composition of the jury.
State v. Falkner 490
5. All that the Constitution forbids is systematic exclusion of identifiable segments of the community from jury panels and

from the juries ultimately drawn from those panels. The burden is on the defendant to allege and prove such systematic exclusion.
State v. Falkner 490

6. In viewing a matter on appeal we are guided by the rule that where evidence is in conflict or reasonable minds may differ, it is normally within the province of the jury to decide issues of fact.
Chirnside v. Lincoln Tel. & Tel. Co. 784

Jurisdiction

1. Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent.
In re Interest of L.D. et al. 249
Black v. Sioux City Foundry Co. 824

2. Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter.
In re Interest of L.D. et al. 249

3. Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte.
In re Interest of L.D. et al. 249

4. Verification of a pleading constitutes no part of a pleading and, ordinarily, is not necessary to vest jurisdiction in a court.
In re Interest of L.D. et al. 249

5. If a lower court does not have subject matter jurisdiction and, therefore, has no power to entertain the proceedings or decide a question, an appellate court lacks jurisdiction to review or evaluate an evidentiary determination for an act outside the jurisdiction of the court whose judgment or order is appealed.
In re Interest of L.D. et al. 249

6. Although an extrajurisdictional act of a lower court cannot vest the appellate court with jurisdiction to review or evaluate an evidentiary determination involved in such act, an appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or final order sought to be reviewed.
In re Interest of L.D. et al. 249

7. Concerning a contract claim against a city of the primary class, Neb. Rev. Stat. § 15-840 (Reissue 1983) requires that such claim be filed with the city clerk and disallowed before a claimant, pursuant to Neb. Rev. Stat. § 15-841 (Reissue 1983), may timely appeal from the city's disallowance and thereby become entitled to invoke a district court's power to adjudicate the merit of the disallowed claim.
Andrews v. City of Lincoln 748

8. If a district court lacks power to adjudicate whether a claim is meritorious, the Supreme Court also lacks power to determine the merit of the claim which was the subject matter of the proceedings in the district court.
Andrews v. City of Lincoln 748
In re Complaint of Fecht 752
9. The Nebraska Public Service Commission lacks jurisdiction to construe the provisions of Neb. Rev. Stat. § 88-503(3)(b) (Supp. 1983) or of any bond provided pursuant thereto.
In re Complaint of Fecht 752
10. One who proves he or she met the durational residency requirement for jurisdiction in divorce proceedings set out in Neb. Rev. Stat. § 42-349 (Reissue 1984) shall be permitted the inference that such residency was with the intention to make Nebraska a permanent home, absent a showing that the residency was a sham and not bona fide.
Rector v. Rector 800

Juror Qualifications

1. A juror need not be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court.
State v. Kern 177
2. Neb. Rev. Stat. § 29-2006(3) (Reissue 1985) held constitutional.
State v. Burchett 444
3. Prospective jurors who are unable to fairly determine guilt because of their opposition to capital punishment are not a cognizable group.
State v. Burchett 444
4. In a prosecution for first degree murder, the State may use peremptory challenges to remove jurors who are opposed to the death penalty.
State v. Burchett 444

Jury Instructions

1. Even though a lesser-included offense charge is wrongfully included in the court's instructions to the jury, where the defendant is found guilty of the greater crime, he or she has not been prejudiced by the erroneous instruction.
State v. Pribil 28
2. In a prosecution for a felony, error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged unless requested to do so.
State v. Pribil 28
3. It is the duty of a trial court to instruct as to the law applicable to the case. Neither the defense nor the prosecution has the option of precluding the court from carrying out this duty in hopes of

forcing an "all or nothing" verdict.
State v. Pribil 28

4. The trial court may instruct on a lesser-included offense over the objection of the defendant if the information or complaint charging the crime is such as to give the defendant notice that he or she could at the same time face the lesser-included offense charge. To the extent that *McConnell v. State*, 77 Neb. 773, 110 N.W. 666 (1906), contains language to the contrary, such language is expressly disapproved.
State v. Pribil 28

5. Either the State or the defendant may request a lesser-included offense instruction where it is supported by the pleadings and the evidence. However, absent such a request, it is not error for the trial court to fail to give such instruction even though warranted.
State v. Pribil 28

6. Where the plaintiff claims damages for lost wages, and the trial court instructs the jury that the plaintiff can recover damages for wages lost due to the inability of the plaintiff to work, it is not error to refuse to instruct that the plaintiff has a duty to mitigate damages.
Beatty v. Davis 663

7. Counsel has the duty of tendering a more specific instruction where one is desired.
Beatty v. Davis 663

8. Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. All other instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
State v. Copple 672

9. In determining the sufficiency of jury instructions on appeal, this court will read the instructions as a whole, and when they fairly submit the case and the jury could not have been misled, there is no prejudicial error.
Steed v. Oak Ridge Equestrian Ctr. 792

10. It is not error for the trial court to refuse a requested instruction when it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case.
Steed v. Oak Ridge Equestrian Ctr. 792

11. Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. Ordinarily, it is error to

submit to the jury an issue which is not pleaded in the case.
Steed v. Oak Ridge Equestrian Ctr. 792

Jury Trials

1. Notwithstanding constitutional mandates regarding a jury trial, such as the sixth amendment to the U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution, there is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of imprisonment of 6 months or less.
State v. Kennedy 164
2. The U.S. Constitution, through the due process clause of the 14th amendment, requires the states to provide a trial by jury whenever the 6th amendment would so require if the case were in federal court.
State v. Bishop 522
State v. Lafler 613
3. A voluntary waiver of the constitutional right to a jury trial must be express and intelligent.
State v. Bishop 522
4. A demand is required to invoke the statutory right to a jury trial for a petty offense in county court. A failure to file a timely request in accordance with the rules of court constitutes a waiver of the statutory right to a jury trial.
State v. Bishop 522
State v. Lafler 613
5. An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.
State v. Lafler 613
6. A waiver of the constitutional right to a jury trial cannot be presumed from a silent record.
State v. Lafler 613

Juvenile Courts

1. The Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984), must be liberally construed to accomplish its purposes serving the best interests of juveniles within the act.
In re Interest of L.D. et al. 249
2. Where there is a dispute in the evidence, this court will give great weight to the juvenile court's findings because it heard and observed the parties and witnesses.
In re Interest of J.W. 897

Labor and Labor Relations

A labor contract is irrelevant to the determination of the existence of misconduct, because, generally, private labor agreements may not

render an unemployment compensation law ineffectual.
O'Keefe v. Tabitha, Inc. 574

Laches

A judgment will not be set aside on the application of a party who has, by his own laches, failed to avail himself of an opportunity to defend.
Forker Solar, Inc. v. Knoblauch 143

Legislature

1. If the legislature has made a reasonable classification, one that is not a mere cloak or cover for an arbitrary exemption of certain persons or a certain class of persons, but a natural and proper selection of those who, upon a reasonable view of the mischiefs to be met, should be subject to the regulations prescribed, and the law is made to operate generally and uniformly upon all of the class so constituted, the constitutional provision in question is not violated.
School Dist. No. 46 v. City of Bellevue 543
2. The fixing of boundaries of school districts is exclusively a legislative function, and it may be properly delegated to a subordinate agency, providing the Legislature prescribes the manner and the standards under which the power of the designated board may be exercised. The Legislature may delegate this authority provided it states the purpose for doing so and sets up reasonable standards to guide the agency which is to administer it.
School Dist. No. 46 v. City of Bellevue 543
3. One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent.
County of Lancaster v. Maser 566
4. When statutory language is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of the lawmakers.
County of Lancaster v. Maser 566
5. In determining the intent of the Legislature, the Supreme Court considers the history of the legislation and the reasonableness of an interpretation, weighed against an unreasonable or absurd construction evidently not intended by the Legislature.
County of Lancaster v. Maser 566
6. Legislative history includes the record of a floor explanation or debate, which is an extrinsic, secondary source in statutory interpretation.
County of Lancaster v. Maser 566
7. The Legislature may not declare the weight to be given to evidence or what evidence shall be conclusive proof of an issue of fact.
State v. Burling 725

8. Whether evidence is of probative value is a legal question, the judicial analysis and resolution of which the Legislature cannot impair.
State v. Burling 725

Lesser-Included Offenses

1. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
State v. Pribil 28

2. When some of the elements of the crime charged in the information, without the addition of any element irrelevant to the original crime charged, *may* constitute another crime or crimes, such other crime or crimes are included within the crime charged.
State v. Pribil 28

3. Where the lesser offense may be committed in two or more independent ways, one type may be a lesser-included offense even though the remaining type or types are not.
State v. Pribil 28

4. The nature of the crime charged in the information must be such as to give the defendant notice that he or she could at the same time face the lesser-included offense charge.
State v. Pribil 28

5. Even though a lesser-included offense charge is wrongfully included in the court's instructions to the jury, where the defendant is found guilty of the greater crime, he or she has not been prejudiced by the erroneous instruction.
State v. Pribil 28

6. In a prosecution for a felony, error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged unless requested to do so.
State v. Pribil 28

7. The trial court may instruct on a lesser-included offense over the objection of the defendant if the information or complaint charging the crime is such as to give the defendant notice that he or she could at the same time face the lesser-included offense charge. To the extent that *McConnell v. State*, 77 Neb. 773, 110 N.W. 666 (1906), contains language to the contrary, such language is expressly disapproved.
State v. Pribil 28

8. Either the State or the defendant may request a lesser-included offense instruction where it is supported by the pleadings and the evidence. However, absent such a request, it is not error for the trial court to fail to give such instruction even though warranted.
State v. Pribil 28

Liability

1. The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm.
   Vice v. Darm Corp. 1
2. The modification of a guaranty of such a nature as would substantially change the liability of the parties is an affirmative defense which must be pled.
   Lease Northwest v. Davis 617
3. Merchants cannot claim protection from civil liability in accord with Neb. Rev. Stat. § 29-402.01 (Reissue 1985) where the detention of a suspected shoplifter was unreasonable because it continued after the detainers knew that their suspicions were groundless and that they had made a mistake.
   Latek v. K Mart Corp. 807
4. An action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982), may be based on the theory of respondeat superior or on a theory of direct negligence.
   Naidoo v. Union Pacific Railroad 853

Liens

The time for redemption, as such phrase is used in Neb. Rev. Stat. § 77-1902 (Reissue 1986), is the 3 years immediately following a delinquent tax sale. An action to foreclose a tax lien pursuant to § 77-1902 can only be brought within the 90 days immediately after expiration of the time for redemption.
County of Lancaster v. Maser 566

Mandamus

A writ of mandamus is not an available remedy when there is a plain and adequate remedy at law.
Olson v. County of Dakota 516

Marriage

In a prosecution for a crime of violence, the defendant's spouse may be called to testify against the defendant as to any matter, including confidential communications. Neb. Rev. Stat. § 27-505(3)(a) (Reissue 1985).
State v. Burchett 444

Medical Malpractice

The Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 1984), does not have application to acts of negligence committed by otherwise qualified health care providers outside the boundaries of this state.
Harper v. Silva 645

Mental Competency

The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.
State v. Davis 771

Mental Health

1. This court will not interfere on appeal with a final order made by the district court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof.
State v. Steele 476
2. A district court reviews the determination of a mental health board de novo on the record.
In re Interest of Kinnebrew 885
3. The standard of review of this court, in mental health proceedings, requires that a final order made by the district court be affirmed unless this court can say, as a matter of law, that the order is not supported by clear and convincing evidence.
In re Interest of Kinnebrew 885
4. The transcript of the proceeding before a mental health board may not be treated as evidence before the board, the district court, or this court unless the facts in the transcript are offered as evidence, are not objected to, and are reviewed by the trier of fact.
In re Interest of Kinnebrew 885
5. In proving the dangerousness of a mentally ill person as manifested by "evidence of inability to provide for his basic human needs," within the meaning of Neb. Rev. Stat. § 83-1009(2) (Cum. Supp. 1986), expert testimony may be used to prove such a condition.
In re Interest of Kinnebrew 885

Minors

1. The Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984), must be liberally construed to accomplish its purposes serving the best interests of juveniles within the act.
In re Interest of L.D. et al. 249
2. An adjudication under Neb. Rev. Stat. § 43-247 (Reissue 1984) of the Nebraska Juvenile Code is an appealable order.
In re Interest of L.D. et al. 249

Miranda Rights

1. Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."
   State v. Bowersmith 6
2. The *Miranda* warnings are procedural safeguards intended to secure the privilege against compelled self-incrimination.
   State v. Evans 64
3. There is no requirement in this jurisdiction that *Miranda* warnings be given prior to a request to submit to a chemical test of blood, breath, or urine.
   State v. Bishop 522

Modification of Decree

1. A proceeding to modify a child support order is not a retrial of the original case nor a review of the original decree.
   Wagner v. Wagner 155
2. The paramount issue in child support cases, whether originally or in proceedings for modification, remains the best interests of the children.
   Wagner v. Wagner 155
3. Increased age of children alone will not furnish a satisfactory basis for a modification of child support unless accompanied by competent evidence of the actual increase in the cost of maintaining the children.
   Wagner v. Wagner 155
4. Although as a general rule a decree awarding child support will not be modified because of a change of circumstances which was in the contemplation of the parties at the time the original or preceding order was made, we limit that rule to include only those anticipated changes which were specifically noted on the record made at the time of entry of the previous order. To the extent that the language of *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985), has been misinterpreted, that interpretation is expressly disapproved.
   Wagner v. Wagner 155
5. Questions relating to the modification of child support are initially entrusted to the sound discretion of the trial court, and, although on appeal we are required to review the record de novo, in the absence of an abuse of discretion, the decision of the trial court will be affirmed.
   Wagner v. Wagner 155
6. A significant increase in the appellant's income, along with the increased ages of the children and the inability of the appellee to afford to pay the children's bills on the current support payment,

meets the requirement of a material change in circumstances and supports the trial court's decision to modify child support payments.
Wilson v. Wilson 589

Motions for Continuance

1. Absent an abuse of discretion, the decision of a trial judge on a motion for continuance will be upheld on appeal.
State v. Polyascko 272
2. A motion for continuance is addressed to the court's sound discretion, and absent a showing of an abuse of that discretion the trial court's ruling will not be disturbed on appeal.
State v. Sluyter 768
3. There is no abuse of discretion by the court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result of that denial.
State v. Sluyter 768

Motions for Mistrial

1. The determination of whether to grant a motion for mistrial lies within the sound discretion of the trial court.
State v. Borchardt 47
2. A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of other incompetent matters are examples of occurrences which may constitute such events.
State v. Borchardt 47
3. Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike improper material is sustained and the jury is admonished to disregard such material.
State v. Borchardt 47
4. Determination whether to grant a mistrial is a matter within the sound discretion of a trial court, whose ruling regarding a mistrial will be upheld unless such ruling constitutes an abuse of discretion.
State v. Clancy 492

Motions for New Trial

New evidence offered in support of a motion for new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a new verdict.
State v. Koch 926

Motions to Suppress

This court will not overturn the trial court's factual findings when

determining the correctness of the trial court's rulings on the suppression of evidence unless those findings are clearly wrong.
State v. Bowersmith 6
State v. Copple 672

Motions to Vacate

1. Factors to be considered in determining whether a trial court abused its discretion in rendering a default judgment include the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings.
Forker Solar, Inc. v. Knoblauch 143

2. One who seeks to set aside a default judgment against him must show that neither he nor his attorney was negligent in failing to appear and defend.
Forker Solar, Inc. v. Knoblauch 143

3. A judgment will not be set aside on the application of a party who has, by his own laches, failed to avail himself of an opportunity to defend.
Forker Solar, Inc. v. Knoblauch 143

Motor Vehicles

1. It is a general rule that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course be changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he is traveling.
Chlopek v. Schmall 78

2. The basis of the foregoing rule is that the driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object in front of him.
Chlopek v. Schmall 78

3. A driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway. After having stopped, such driver shall yield the right-of-way to any vehicle which is approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves his vehicle into or across such intersection.
Chlopek v. Schmall 78

Municipal Corporations

1. When an employee of the city, whose duties in part are to help apprehend persons using marijuana, himself engages in such activity, such action does constitute an act unbecoming an incumbent of the particular position, does affect the efficient

conduct of the business of the city, and is not in the best interest of the city government.
Ostwald v. City of Omaha 530

2. Concerning a contract claim against a city of the primary class, Neb. Rev. Stat. § 15-840 (Reissue 1983) requires that such claim be filed with the city clerk and disallowed before a claimant, pursuant to Neb. Rev. Stat. § 15-841 (Reissue 1983), may timely appeal from the city's disallowance and thereby become entitled to invoke a district court's power to adjudicate the merit of the disallowed claim.
Andrews v. City of Lincoln 748

Negligence

1. The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm.
Vice v. Darm Corp. 1

2. It is a general rule that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course be changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he is traveling.
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Chlopek v. Schmall 78

4. In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury, a failure to discharge that duty, and injury resulting from the failure. The petition must allege these essential elements and the proof must support the allegations, or there can be no recovery.
Knoell v. Huff 90
Holden v. Urban 472

5. One alleging negligence has the burden to prove such negligence. Establishing that an accident has occurred does not prove a case of

negligence. Negligence is not presumed and must be proved by evidence, direct or circumstantial.
Holden v. Urban 472

6. Foreseeability is a factor in establishing a defendant's duty.
Holden v. Urban 472

7. The doctrine of res ipsa loquitur is that where the instrumentality causing the injury is shown to be under the defendant's exclusive control and management and the accident is one that in the ordinary course of things does not occur if those who have its management or control use proper care, reasonable evidence is afforded, in the absence of an explanation by the defendant, that the accident arose from want of proper care.
Beatty v. Davis 663

8. If specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable.
Beatty v. Davis 663

9. An action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq. (1982), may be based on the theory of respondeat superior or on a theory of direct negligence.
Naidoo v. Union Pacific Railroad 853

New Trial

While any one of several errors may not, in and of itself, warrant a reversal, if all of the errors in the aggregate establish a defendant did not receive a fair trial, a new trial must be granted.
State v. Kern 177

Notice

1. A guarantor, being one "who owes payment or other performance of the obligation secured," is a "debtor" as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980), and is thus entitled to notice of sale of collateral under the provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980).
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463

2. An ambiguity in a notice sent pursuant to the requirements of Neb. U.C.C. § 9-504(3) (Reissue 1980) is to be resolved against the drafter of the notice.
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463

3. A reasonably diligent search for the purpose of justifying service by publication does not require the use of all possible or conceivable means of discovery, but is such an inquiry as a reasonably prudent person would make in view of the circumstances and must extend to those places where information is likely to be obtained and to those persons who, in the ordinary

course of events, would be likely to receive news of or from the absent person.
In re Interest of A.W. 764
4. Whether all reasonable means to qualify a search as a "reasonably diligent" one have been exhausted must be determined by the circumstances of each particular case.
In re Interest of A.W. 764

Options to Buy or Sell

1. A broker is not entitled to a commission for producing a prospective buyer willing to execute only an option to purchase realty.
Marathon Realty Corp. v. Gavin 458
2. Once an option to purchase is exercised, it becomes a contract for the purchase and sale of the realty.
Marathon Realty Corp. v. Gavin 458
3. Neb. Rev. Stat. § 36-107 (Reissue 1984) requires that every contract between the owner and any broker or agent employed to sell land is void unless the contract is in writing and subscribed by both the owner and the broker or agent; the contract must also describe the land to be sold and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.
Marathon Realty Corp. v. Gavin 458
4. One who is a joint owner of realty but represents himself or herself to be the sole owner thereof may not avoid full payment of an agreed commission on the ground that another also has an interest in the property.
Marathon Realty Corp. v. Gavin 458
5. A broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed or by said owner's inability to convey good title to real estate because of the failure to obtain a joinder in the conveyance by a third party who has an interest in the land.
Marathon Realty Corp. v. Gavin 458

Other Acts

1. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character.
State v. Robb 14
State v. Kern 177
State v. Clancy 492
State v. Kenny 638

2. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) permits evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show defendant's propensity or disposition to commit the crime charged.
State v. Kern 177
State v. Clancy 492
3. Evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question.
State v. Kern 177
4. The admissibility of evidence concerning other crimes, wrongs, or acts must be determined upon the facts of each case.
State v. Kern 177
5. No exact limitation of time can be fixed as to when evidence of other crimes, wrongs, or acts tending to prove intent to commit the offense charged is remote.
State v. Kern 177
6. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Neb. Evid. R. 404(2) (Neb. Rev. Stat. § 27-404(2) (Reissue 1985)).
State v. Clancy 492
7. The "purposes" set forth in Neb. Evid. R. 404(2) (Neb. Rev. Stat. § 27-404(2) (Reissue 1985)) are not exhaustive or mutually exclusive but are illustrative only, and are not pigeonholes for admission of evidence pertaining to "other acts."
State v. Clancy 492
8. Under Neb. Evid. R. 404(2), a defendant's attempted intimidation or intimidation of a State's informant or witness is relevant evidence concerning the defendant's conscious guilt that a crime has been committed. Neb. Rev. Stat. § 27-404(2) (Reissue 1985).
State v. Clancy 492

Parental Rights

1. One need not have physical possession of a child to demonstrate the existence of the neglect contemplated by Neb. Rev. Stat. § 43-292(2) (Reissue 1984), which provides for the termination of parental rights when the parents have "substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection."
In re Interest of J.N.V. 108
2. An order terminating parental rights is reviewed de novo on the record in this court.
In re Interest of D.J. et al. 226
In re Interest of J.S., S.C., and L.S. 234
In re Interest of J.W. 897

3. An order terminating parental rights must be supported by clear and convincing evidence, and the primary consideration in such cases is the best interests of the children.
In re Interest of D.J. et al. 226
In re Interest of J.S., S.C., and L.S. 234
In re Interest of J.W. 897
4. An order terminating parental rights must be supported by clear and convincing evidence and should be made only as a last resort when no reasonable alternative exists.
In re Interest of J.S., S.C., and L.S. 234
5. A child should not be left suspended in foster care and should not be required to exist in a wholly inadequate home. Further, a child cannot be made to await uncertain parental maturity.
In re Interest of J.S., S.C., and L.S. 234
6. The burden is on a natural parent challenging the validity of a relinquishment to prove that it was not voluntarily given.
Gaughan v. Gilliam 836
7. In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid.
Gaughan v. Gilliam 836
8. The mere fact that a mother of a child might be influenced by the real concern expressed by friends or family for the welfare of both the mother and the child does not necessarily mean that a relinquishment executed by such mother is the product of threats, coercion, fraud, or duress.
Gaughan v. Gilliam 836

Perjury

A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the witness' testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)).
State v. Williams 114

Photographs

1. Each case must be considered on its own facts, and convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
State v. Palmer 282

2. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
State v. Palmer 282

Plea Bargains

1. An accomplice's testimony is admissible notwithstanding the fact that the testimony is procured by means of a plea bargain.
State v. Burchett 444
2. The promise of leniency or otherwise favorable prosecutorial treatment goes only to the credibility of the accomplice's testimony, not to its admissibility.
State v. Burchett 444
3. Generally, it is only where the prosecution has bargained for false or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require its preclusion.
State v. Burchett 444
4. The State may withdraw from a plea arrangement at any time prior to, but not after, actual entry of the defendant's guilty plea or before the defendant's other action constituting detrimental reliance on the plea arrangement.
State v. Dillon 503

Plea in Abatement

Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence.
State v. Baker 130

Pleadings

1. Ordinarily, the overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve error.
State v. Borchardt 47
2. One wishing to preserve error on the basis of remarks contained in an opening statement generally must object to the questioned remarks when made, notwithstanding the overruling of a motion in limine.
State v. Borchardt 47
3. A pleading may be amended in furtherance of justice, to conform to the proof, if the proposed amendment does not change substantially the claim or defense. The decision to allow or deny such amendment rests in the sound discretion of the court.
Chlopek v. Schmall 78

4. The right to amend or correct a defect in a pleading is not without limitation.
Knoell v. Huff 90
5. A cause of action pleaded by amendment ordinarily relates back to the original pleading, provided that claimant seeks recovery on the same general set of facts.
Forker Solar, Inc. v. Knoblauch 143
6. The theory of recovery is not itself a cause of action. If the general facts upon which the right to recover is based are the same, the amendment relates back to the original pleading.
Forker Solar, Inc. v. Knoblauch 143
7. A general denial does not put corporate character in issue.
Forker Solar, Inc. v. Knoblauch 143
8. A petition, as a pleading, is a plaintiff's or claimant's written statement of fact which invokes the jurisdiction of a court, sets out a cause of action, and seeks relief.
In re Interest of L.D. et al. 249
9. Verification of a pleading constitutes no part of a pleading and, ordinarily, is not necessary to vest jurisdiction in a court.
In re Interest of L.D. et al. 249
10. As any other formal matter, an absence of, or defect in, verification is waived by failure to make a proper and timely objection.
In re Interest of L.D. et al. 249
11. Proper pleading requires a petition to state in logical and legal form the facts which constitute the plaintiff's cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute.
Holden v. Urban 472
12. The Supreme Court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried.
Holden v. Urban 472
13. Generally, this court will not consider for the first time on appeal issues not properly raised in the pleadings nor litigated at trial.
Leseberg v. Meints 533
14. An affirmative defense must be specifically pled to be considered.
Lease Northwest v. Davis 617
15. Matters which seek to avoid a valid contract are affirmative defenses.
Lease Northwest v. Davis 617
16. The modification of a guaranty of such a nature as would substantially change the liability of the parties is an affirmative defense which must be pled.
Lease Northwest v. Davis 617
17. The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so they cannot

recover upon mere argument alone.
First Nat. Bank v. Benedict Consol. Indus. 860

Pleas

1. A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional, except the defense that the indictment, information, or complaint is not sufficient to charge an offense.
State v. Kennedy 164
2. A valid guilty plea waives the right to a trial, whether a trial by jury or without a jury, and waives the right to counsel, including the right to court-appointed counsel in an otherwise appropriate case.
State v. Kennedy 164
3. A factual basis for a guilty plea may be established by inquiry of the defendant.
State v. Kennedy 164
4. The withdrawal of a plea is a matter addressed to the discretion of the trial court, and the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion.
State v. Suffredini 220
State v. Hoffman 830
5. A factual basis for a plea may be determined from the statements of the county attorney.
State v. Suffredini 220
6. A sentencing judge is not required to inform a criminal defendant that a sentence which need not be imposed consecutively to any other may nonetheless, in the judge's discretion, be so imposed.
State v. Suffredini 220
7. After the entry of a plea of no contest but before sentencing, the trial court should allow a defendant to withdraw his or her plea for any fair and just reason, provided the prosecution would not be substantially prejudiced by its reliance upon the plea.
State v. Suffredini 220
State v. Hoffman 830
8. While a more severe punishment cannot be exacted because a defendant pleads not guilty and puts the State to the expense of a trial, a defendant nonetheless has no absolute right to a reduced sentence because he saves the State the expense of going to trial.
State v. Suffredini 220
9. The standard for accepting a plea of guilty is that it must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant, is made understandingly, and has a factual basis.
State v. Joubert 411
10. Before accepting a plea of guilty the trial court should examine the defendant sufficiently to determine whether he understands the

nature of the charge, the possible penalty, and the effect of his plea.
State v. Joubert 411
11. Whether a defendant's guilty plea, which results in a conviction later used as the basis for application of an enhanced penalty, has been made understandingly, intelligently, and voluntarily is not an issue in the Supreme Court's review concerning the validity of an enhanced punishment imposed on a defendant.
State v. Davis 518
12. The determination of the trial court on the issue of a defendant's competency to enter a plea of guilty will not be set aside on appeal if there is sufficient evidence to support such finding.
State v. Davis 771
13. The burden is upon the defendant to establish by clear and convincing evidence the grounds for withdrawing a plea.
State v. Hoffman 830

Police Officers and Sheriffs

1. Generally, as a practical matter, no criminal investigation is complete until sufficient facts have been obtained to justify the arrest and conviction of the defendant.
State v. Nissen 60
2. The obligation of an officer making an arrest under a warrant is twofold: to apprehend the person named in the warrant and to avoid interfering with one not involved.
State v. Nissen 60
3. The language of Neb. Rev. Stat. § 28-907(1)(a) (Reissue 1985), "to impede the investigation of an actual criminal matter," includes the impeding of the gathering of information as to the identity of a defendant named in an arrest warrant.
State v. Nissen 60
4. Law enforcement officers have a legitimate right to question persons about the identity of the subject of an arrest warrant before they arrest the suspect; and although persons so questioned may have the right to refuse to answer such inquiry, if they choose to answer they may not give false information without subjecting themselves to criminal liability.
State v. Nissen 60
5. The lawfulness of an arrest without a warrant must be based on probable cause, which exists where the facts and circumstances within an officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed.
State v. Roggenkamp 914
6. If the facts available to the officer at the time of the arrest would warrant a person of reasonable caution in the belief the action was

appropriate, then probable cause exists.
State v. Roggenkamp 914

Postconviction

1. Defendant in a postconviction case bears the burden of establishing a basis for relief, and a conviction will not be set aside in the absence of a showing that an error created actual prejudice rather than merely the possibility of prejudice.
State v. Cole 10

2. A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal.
State v. Cole 10
State v. Evans 64
State v. Lytle 486
State v. Falkner 490

3. Issues which were known to defendant and counsel at the time of trial and were capable of being raised in a direct appeal, but were not raised in defendant's direct appeal, are not proper grounds for postconviction relief.
State v. Cole 10

4. It is within the discretion of the district court to determine whether counsel shall be appointed in a postconviction proceeding to represent defendant on appeal to this court, and in the absence of a showing of abuse of discretion, the failure to appoint counsel is not error.
State v. Cole 10

5. An evidentiary hearing on a motion for postconviction relief is not required if the motion, files, and records of the case show the defendant is not entitled to relief.
State v. Evans 64
State v. Bean 278
State v. Lytle 486

6. Postconviction motions cannot be used to obtain a further review of issues already litigated, nor shall a defendant be permitted to rephrase issues already presented to achieve that end.
State v. Evans 64

7. Once a motion for postconviction relief has been judicially determined, any subsequent motions for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of the filing of the prior motion.
State v. Evans 64

8. In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985) for postconviction relief, the trial judge, as the "trier of fact," resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony.
State v. Williams 114

9. In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld, unless such findings are clearly erroneous.
State v. Williams 114
State v. Dillon 503

10. Any matter which can be determined from the record on direct appeal is considered by the Nebraska Supreme Court when ruling on a motion filed pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986). Any such matter is not subject to relitigation in an action brought pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985).
State v. Bean 278
State v. Wilson 721

11. In order to state a cause of action for postconviction relief, the motion must allege facts which, if proved, constitute an infringement of a prisoner's constitutional rights; allegations which are mere conclusions are not sufficient.
State v. Bean 278
State v. Lytle 486

12. To obtain postconviction relief the defendant has the burden of proof to establish the grounds for such relief, and the findings of the district court will not be disturbed on appeal unless clearly erroneous.
State v. Fries 482

13. To establish ineffectiveness of counsel as a ground for postconviction relief, the defendant must prove that his counsel failed to perform at least as well as an attorney in the area with ordinary training and skill in the criminal law.
State v. Fries 482

14. To obtain postconviction relief on the ground of ineffectiveness of counsel, the defendant must show that counsel's action or inaction prejudiced the defense of the case and that there is a reasonable probability that, but for counsel's errors, the result of the case would have been different.
State v. Fries 482

15. When a defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
State v. Lytle 486

16. The Postconviction Act cannot be used as a substitute for appeal or as a further review of issues already litigated.
State v. Falkner 490

17. A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and which were capable of being raised, but were not raised, in the defendant's direct appeal.
State v. Dillon 503

Prejudgment Interest

Prejudgment interest is interest due, pursuant to statute, prior to the rendition of a judgment. In the case of a written instrument, it is allowed on liquidated claims pursuant to the provisions of Neb. Rev. Stat. § 45-104 (Reissue 1984).
Lease Northwest v. Davis 617

Presumptions

1. The law presumes that one of sound mind intends the obvious and probable consequences of his or her voluntary acts.
State v. Robb 14
2. There is a presumption of prejudice involving a defendant's constitutional right to effective assistance of counsel when a defendant demonstrates (1) counsel actively represented conflicting interests and (2) an actual conflict of interest adversely affected performance by the defendant's lawyer. Such conflicts of interest must be shown to have resulted in counsel's conduct detrimental to the defense.
State v. Williams 114
3. When a trustee wrongfully commingles trust money with his own and makes payments from the common fund, it will be presumed that he paid out his own money, and not the trust money.
In re Estate of Redpath 845

Pretrial Procedure

1. No one has a vested right in a procedure; procedural matters can be changed at any time before trial and are binding on the defendant.
State v. Palmer 282
2. If a prosecutor has a duty to disclose a statement in response to a general discovery request, it must derive from the obviously exculpatory character of the evidence.
State v. Tweedy 715
3. In a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal.
State v. Pointer 892
State v. Roggenkamp 914

Prior Convictions

1. Just as a wrong date in an information will not preclude a

defendant from being sentenced as a habitual criminal if the record discloses the defendant could not have been misled or confused, so, too, a wrong date in a complaint will not preclude a defendant from being sentenced as one who has previously been convicted of driving while under the influence of alcohol if the record discloses that the defendant could not have been misled or confused.
State v. Jameson 38

2. The State's burden in proving valid prior convictions for enhancement purposes is only to show that the defendant had or knowingly and voluntarily waived counsel at the time of such convictions.
State v. Foster 267
State v. Thompson 922

3. A sufficiently complete checklist or other docket entry may be used to establish a valid waiver of counsel for enhancement purposes.
State v. Foster 267

4. To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction. Other objections to the validity of such prior conviction constitute collateral attacks on that prior conviction and must be raised either by direct appeal from the prior conviction or in separate proceedings commenced expressly for the purpose of setting aside such prior conviction as an invalid judgment.
State v. Davis 518

5. Whether a defendant's guilty plea, which results in a conviction later used as the basis for application of an enhanced penalty, has been made understandingly, intelligently, and voluntarily is not an issue in the Supreme Court's review concerning the validity of an enhanced punishment imposed on a defendant.
State v. Davis 518

6. Existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the accused's testimony and duly authenticated records maintained by the courts or penal and custodial authorities.
State v. Davis 518

Prior Statements

1. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the witness' testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)).
State v. Williams 114

2. What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Neb. Evid. R. 801(4)(a)(i) are satisfied. Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985).
State v. Williams 114
3. Subject to the exception specified in Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)), a witness' inconsistent statement may be admissible evidence to aid the jury in evaluating that witness' credibility, but a witness' inconsistent statement is not substantive evidence of the matter asserted unless such statement is otherwise admissible under the Nebraska Evidence Rules.
State v. Williams 114

Probable Cause

1. The test of probable cause for a warrantless arrest is whether, at the time of the arrest, the officer had knowledge of facts and circumstances based on reasonably trustworthy information which was sufficient to warrant a prudent man in believing the defendant had committed or was committing an offense.
State v. Evans 64
State v. Bishop 522
State v. Roggenkamp 914
2. If the facts available to the officer at the time of the arrest would warrant a person of reasonable caution in the belief the action was appropriate, then probable cause exists.
State v. Roggenkamp 914

Probation and Parole

1. The granting of probation as opposed to imposing a jail sentence is a matter left for the discretion of the trial court.
State v. Kane 245
2. Motions to revoke probation must be filed in the sentencing court. Where a probationer was tried, convicted, and sentenced in the county court, it is the county court, not the district court which served in its appellate capacity, that has jurisdiction to hear a motion to revoke probation.
State v. Daniels 264
3. Whether to grant probation instead of a jail sentence is a matter left to the trial court's discretion. Absent an abuse of discretion, a sentence imposed within the statutory limits will be upheld on appeal.
State v. Tweedy 715

Proof

1. Defendant in a postconviction case bears the burden of establishing a basis for relief, and a conviction will not be set aside

in the absence of a showing that an error created actual prejudice rather than merely the possibility of prejudice.
State v. Cole 10

2. In second degree murder cases malice and intent may be inferred from the evidence relating to the circumstances of the criminal act.
State v. Moniz 198

3. A criminal conviction may be based upon the uncorroborated statements of an accomplice.
State v. Burchett 444

4. One alleging negligence has the burden to prove such negligence. Establishing that an accident has occurred does not prove a case of negligence. Negligence is not presumed and must be proved by evidence, direct or circumstantial.
Holden v. Urban 472

5. To establish ineffectiveness of counsel as a ground for postconviction relief, the defendant must prove that his counsel failed to perform at least as well as an attorney in the area with ordinary training and skill in the criminal law.
State v. Fries 482

6. To obtain postconviction relief on the ground of ineffectiveness of counsel, the defendant must show that counsel's action or inaction prejudiced the defense of the case and that there is a reasonable probability that, but for counsel's errors, the result of the case would have been different.
State v. Fries 482

7. When a defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
State v. Lytle 486

8. Where value of goods is an element of the crime charged and there is a market for the goods, the value to be proved is the market value at the time and place of the alleged crime.
State v. Clancy 492

9. Existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the accused's testimony and duly authenticated records maintained by the courts or penal and custodial authorities.
State v. Davis 518

10. A workers' compensation plaintiff has the burden of proving that

an injury resulted from an accident arising out of and in the course of employment.
Hayes v. A.M. Cohron, Inc. 579

11. If it is claimed that the injury was the result of employment exertion, the evidence must show that the employment contributed to the cause of the injury in some material and substantial degree.
Hayes v. A.M. Cohron, Inc. 579

12. The presence of a preexisting condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment.
Hayes v. A.M. Cohron, Inc. 579

13. To avoid disqualification under Neb. Rev. Stat. § 48-628(a)(1) (Cum. Supp. 1986), the employee who voluntarily severed the employment relationship has the burden of proving that the leaving was with good cause.
Ponderosa Villa v. Hughes 627

14. A photocopy of a writing is admissible in evidence to the same extent as the original unless a genuine question is raised as to the authenticity of the original or, under the circumstances, it would be unfair to admit the duplicate in lieu of the original. The burden of raising an issue as to the authenticity of the original or the unfairness of the circumstances is on the party opposing admission.
State v. Frederiksen 653

15. Prima facie proof of a case is less stringent than proof by a preponderance of the evidence. A "prima facie" case requires only enough evidence to take the question to the jury, whereas "preponderance of the evidence" requires proof which leads the jury to find the existence of the contested fact is more probable than its nonexistence.
State v. Copple 672

16. For admission of a coconspirator's act as evidence against a defendant-coconspirator being tried for a crime other than the conspiracy itself, the trial court must first determine whether the State has proved a prima facie case that (1) a conspiracy existed, (2) the defendant and the witness were members of the conspiracy, and (3) the witness' act was done during and in furtherance of the conspiracy.
State v. Copple 672

17. An alcohol-related violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984) may be proved by establishing that one was in actual physical control of a motor vehicle while under the influence of alcohol or that one was in actual physical control of a motor vehicle while having ten-hundredths of 1 percent by weight

of alcohol in his or her body fluid.
State v. Burling 725

18. In a discrimination suit brought under the provisions of Neb. Rev. Stat. § 48-1104 (Reissue 1984) of the Nebraska Fair Employment Practice Act, the following is the procedure to be followed in presentation of evidence relevant to a question about discrimination against a disabled person: First, the complainant has the burden of proving a prima facie case of discrimination. Second, if the complainant succeeds in proving that prima facie case, the burden shifts to the respondent to articulate some legitimate, nondiscriminatory reason for the complainant's rejection or discharge from employment. Third, should the respondent carry the burden, the complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the respondent were not its true reasons, but were a pretext for discrimination.
Father Flanagan's Boys' Home v. Goerke 731

19. Impairment of earning capacity is an item of general damage, and proof may be had under general allegations of injury and damage. Proof of an actual loss of wages or earnings is not essential to a recovery for loss of earning capacity.
Chirnside v. Lincoln Tel. & Tel. Co. 784

20. It is necessary to prove the existence of at least an implied agreement, to establish a conspiracy.
Steed v. Oak Ridge Equestrian Ctr. 792

21. The burden is on a natural parent challenging the validity of a relinquishment to prove that it was not voluntarily given.
Gaughan v. Gilliam 836

22. One who claims the existence of a constructive trust has the burden of proof to establish the existence of a constructive trust by evidence which is clear, satisfactory, and convincing in character.
In re Estate of Redpath 845

23. As a general rule, provided the property can be traced or identified, any third person who has obtained trust property or its product by a transfer made in violation of the trust may be subject to a constructive trust. It is necessary, however, that the property can be traced or identified.
In re Estate of Redpath 845

24. The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so they cannot recover upon mere argument alone.
First Nat. Bank v. Benedict Consol. Indus. 860

25. To recover from the Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1984), a claimant must prove by a preponderance of evidence (1) a prior permanent partial disability, (2) a second or

subsequent injury which is compensable, causing permanent disability, and (3) the combination of permanent disabilities existing after such second or subsequent injury is substantially greater in degree or percentage than permanent disability from the second or subsequent injury, considered by itself and not in conjunction with the prior permanent disability.
Norris v. Iowa Beef Processors 867

26. One claiming against the Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1984), has the burden to prove that the combination of permanent disabilities is substantially greater in degree or percentage than the permanent disability from the second or subsequent compensable injury considered by itself.
Norris v. Iowa Beef Processors 867

27. In addition to establishing an employee's decrease or loss of earning power or diminished employability, a claimant seeking payment from the Second Injury Fund must also establish that, after the second or subsequent compensable injury, an employee's combined permanent disabilities are *substantially greater* than the permanent disability from the last compensable injury considered by itself.
Norris v. Iowa Beef Processors 867

28. In proving the dangerousness of a mentally ill person as manifested by "evidence of inability to provide for his basic human needs," within the meaning of Neb. Rev. Stat. § 83-1009(2) (Cum. Supp. 1986), expert testimony may be used to prove such a condition.
In re Interest of Kinnebrew 885

29. The State's burden in proving valid prior convictions for enhancement purposes is only to show that defendant had or knowingly and voluntarily waived counsel at the time of such convictions.
State v. Thompson 922

Property

1. Where the damage to personal property can, at a reasonable cost, be repaired and the property restored to substantially its condition immediately before the damage occurred, and the cost of repair does not exceed the difference in market value of the property before and after the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the loss of use of the property for the reasonable amount of time required to complete the repair.
Chlopek v. Schmall 78

2. Where the damage to personal property is such that it cannot be repaired and the property thereby restored to substantially its condition immediately before the damage occurred, or when the reasonable cost of repair exceeds the difference in market value of

the property immediately before and immediately after the injury, the measure of damages is the lost market value plus the reasonable value of the loss of use of the property for the reasonable amount of time required to obtain a suitable replacement.
Chlopek v. Schmall 78

3. The reasonable value of the loss of use of personal property is generally the fair rental value of property of a like or similar nature or the amount actually paid for rental, whichever is less.
Chlopek v. Schmall 78

4. Where property used for commercial or business purposes cannot be rented, then loss of profits may establish the reasonable value of the loss of use.
Chlopek v. Schmall 78

5. To the extent that any prior cases would limit the total compensation for damage to personal property to the fair market value of the property immediately before the injury, they are expressly overruled.
Chlopek v. Schmall 78

6. As a general rule, provided the property can be traced or identified, any third person who has obtained trust property or its product by a transfer made in violation of the trust may be subject to a constructive trust. It is necessary, however, that the property can be traced or identified.
In re Estate of Redpath 845

Property Division

It is the rule in Nebraska that the division of property and the awarding of alimony in marriage dissolution cases are matters entrusted to the sound discretion of the trial judge. On appeal these matters will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
Busekist v. Busekist 510

Prosecuting Attorneys

1. The responsibility of a public prosecutor differs from that of the usual advocate; his or her duty is to seek justice, not merely to convict. This special duty exists because (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial, the prosecutor is not only an advocate but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in

private practice; the prosecutor should make timely disclosure to the defense of available evidence known to him or her that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.
State v. Borchardt 47

2. Generally, for prosecutorial misconduct to warrant vacation of a conviction, there must be evidence of prejudice to the defendant's right to a fair and impartial trial.
State v. Evans 64

3. That a county attorney vigorously prosecutes one accused of a crime does not constitute prosecutorial misconduct.
State v. Palmer 282

4. If a prosecutor has a duty to disclose a statement in response to a general discovery request, it must derive from the obviously exculpatory character of the evidence.
State v. Tweedy 715

Public Officers and Employees

When an employee of the city, whose duties in part are to help apprehend persons using marijuana, himself engages in such activity, such action does constitute an act unbecoming an incumbent of the particular position, does affect the efficient conduct of the business of the city, and is not in the best interest of the city government.
Ostwald v. City of Omaha 530

Public Service Commission

The Nebraska Public Service Commission lacks jurisdiction to construe the provisions of Neb. Rev. Stat. § 88-503(3)(b) (Supp. 1983) or of any bond provided pursuant thereto.
In re Complaint of Fecht 752

Ratification

In order that a confession of judgment may be binding on the plaintiff, it is essential that he, either expressly or impliedly, assent thereto; if it is made without his request, knowledge, or consent, and entered at the instance of the debtor alone, it will have no validity unless the creditor ratifies or accepts it.
In re Estate of Redpath 845

Real Estate

1. In order for a broker employed to secure a purchaser of realty to recover a commission, his or her efforts must be the efficient procuring cause of the sale.
Marathon Realty Corp. v. Gavin 458

2. The efforts of a broker employed to secure a purchaser of realty

have been the efficient procuring cause of the sale when the broker has secured a prospective purchaser who is ready, willing, and able to buy the property on terms and conditions upon which the broker is authorized to secure a purchaser, or on terms acceptable to the seller.
Marathon Realty Corp. v. Gavin 458
3. Efforts which produce a series of unbroken, continuous events culminating in the sale of realty are the efficient procuring cause of the sale, notwithstanding the fact that such efforts may not be the sole cause of the sale.
Marathon Realty Corp. v. Gavin 458
4. A broker is not entitled to a commission for producing a prospective buyer willing to execute only an option to purchase realty.
Marathon Realty Corp. v. Gavin 458
5. Once an option to purchase is exercised, it becomes a contract for the purchase and sale of the realty.
Marathon Realty Corp. v. Gavin 458
6. Neb. Rev. Stat. § 36-107 (Reissue 1984) requires that every contract between the owner and any broker or agent employed to sell land is void unless the contract is in writing and subscribed by both the owner and the broker or agent; the contract must also describe the land to be sold and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.
Marathon Realty Corp. v. Gavin 458
7. One who is a joint owner of realty but represents himself or herself to be the sole owner thereof may not avoid full payment of an agreed commission on the ground that another also has an interest in the property.
Marathon Realty Corp. v. Gavin 458
8. The general measure of damages for a breach of contract to convey land is the difference between the market value of the land at the time of the breach and the price set out in the contract.
Turner v. Alberts 632
9. The exception to the general rule is that where it appears that special damages have also arisen from the breach, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time the contract was made.
Turner v. Alberts 632

Records

1. A checklist or other docket entry which is made by one authorized to make it imports verity, and unless contradicted it stands as a true record of the event.
State v. Foster 267
2. A checklist which is used as a substitute for a formal, written

journal entry must be prepared with as much care and certainty as any record of a court in order to impart absolute verity.
State v. Foster 267

3. A brief may not expand the evidentiary record and must limit itself to arguments supported by the record.
Father Flanagan's Boys' Home v. Goerke 731

Redemption

The time for redemption, as such phrase is used in Neb. Rev. Stat. § 77-1902 (Reissue 1986), is the 3 years immediately following a delinquent tax sale. An action to foreclose a tax lien pursuant to § 77-1902 can only be brought within the 90 days immediately after expiration of the time for redemption.
County of Lancaster v. Maser 566

Rescission

1. The cancellation of an insurance policy is not a rescission, since a rescission avoids the contract ab initio. A cancellation merely terminates the policy as of the time when the cancellation becomes effective.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

2. Neb. Rev. Stat. §§ 44-515 to 44-521 (Reissue 1984) do not prevent an insurer from rescinding an automobile liability insurance policy for material misrepresentations made by the insured in the application for the policy.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

3. Neb. Rev. Stat. § 44-358 (Reissue 1984) limits but does not eliminate the right of an insurer to rescind an automobile liability insurance policy for fraud in the application.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

4. An accident resulting in injury or damage to a third person does not destroy the right of an insurer to rescind an automobile liability insurance policy for fraud in the application.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

Restitution

Restitution ordered by a court pursuant to Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1986) is a criminal penalty imposed as punishment for the crime, not an administrative or civil penalty as is restitution under Neb. Rev. Stat. § 28-427 (Reissue 1985).
State v. Duran 774

Right to Counsel

1. The right to counsel at a police lineup attaches only at or after the time when adversary judicial proceedings have been initiated against the defendant by way of complaint, indictment, or information.
State v. Evans 64

2. As a result of Neb. Const. art. I, § 11, and U.S. Const. amend. VI, the right to counsel is the right to effective assistance of counsel. For effective assistance of counsel a defendant is constitutionally entitled to a lawyer's representation free from conflicting interests.
State v. Williams 114
3. Once a defendant has been informed of his right to retained or appointed counsel, there is no requirement that the court advise the defendant, on each subsequent court appearance, of the same right.
State v. Tharp 126
4. A valid guilty plea waives the right to a trial, whether a trial by jury or without a jury, and waives the right to counsel, including the right to court-appointed counsel in an otherwise appropriate case.
State v. Kennedy 164
5. The State's burden in proving valid prior convictions for enhancement purposes is only to show that the defendant had or knowingly and voluntarily waived counsel at the time of such convictions.
State v. Foster 267
State v. Thompson 922
6. A sufficiently complete checklist or other docket entry may be used to establish a valid waiver of counsel for enhancement purposes.
State v. Foster 267
7. To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction. Other objections to the validity of such prior conviction constitute collateral attacks on that prior conviction and must be raised either by direct appeal from the prior conviction or in separate proceedings commenced expressly for the purpose of setting aside such prior conviction as an invalid judgment.
State v. Davis 518
8. Under the implied consent law, a driver is not entitled to consult with an attorney, nor is a delay in the test required should a driver request to consult with an attorney.
State v. Bishop 522
9. Indigency, as used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), means the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family.
State v. Lafler 613
10. In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), a

court is to consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.
State v. Lafler 613

11. The right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.
State v. Hoffman 830

Rules of Evidence

1. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character.
State v. Robb 14
State v. Kern 177
State v. Clancy 492
State v. Kenny 638

2. Evidence of a test result cannot be characterized as "scientific" or qualify as "technical or other specialized knowledge," and thus within the purview of Neb. Rev. Stat. § 27-702 (Reissue 1985), unless and until it is established that the test result demonstrates what it is claimed to demonstrate.
State v. Borchardt 47

3. The credibility of a witness may be attacked by any party, including the party calling him. Neb. Evid. R. 607 (Neb. Rev. Stat. § 27-607 (Reissue 1985)).
State v. Williams 114

4. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the witness' testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)).
State v. Williams 114

5. What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Neb. Evid. R. 801(4)(a)(i) are satisfied. Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985).
State v. Williams 114

6. Subject to the exception specified in Neb. Evid. R. 801(4)(a)(i)

(Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)), a witness' inconsistent statement may be admissible evidence to aid the jury in evaluating that witness' credibility, but a witness' inconsistent statement is not substantive evidence of the matter asserted unless such statement is otherwise admissible under the Nebraska Evidence Rules.
State v. Williams 114

7. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) permits evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show defendant's propensity or disposition to commit the crime charged.
State v. Kern 177

8. Evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question.
State v. Kern 177

9. The admissibility of evidence concerning other crimes, wrongs, or acts must be determined upon the facts of each case.
State v. Kern 177

10. No exact limitation of time can be fixed as to when evidence of other crimes, wrongs, or acts tending to prove intent to commit the offense charged is remote.
State v. Kern 177

11. The traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.
State v. Palmer 282

12. In a prosecution for a crime of violence, the defendant's spouse may be called to testify against the defendant as to any matter, including confidential communications. Neb. Rev. Stat. § 27-505(3)(a) (Reissue 1985).
State v. Burchett 444

13. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1985)).
State v. Clancy 492
State v. Copple 672

14. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

accident. Neb. Evid. R. 404(2) (Neb. Rev. Stat. § 27-404(2) (Reissue 1985)).
State v. Clancy 492

15. The "purposes" set forth in Neb. Evid. R. 404(2) (Neb. Rev. Stat. § 27-404(2) (Reissue 1985)) are not exhaustive or mutually exclusive but are illustrative only, and are not pigeonholes for admission of evidence pertaining to "other acts."
State v. Clancy 492

16. Under Neb. Evid. R. 404(2), a defendant's attempted intimidation or intimidation of a State's informant or witness is relevant evidence concerning the defendant's conscious guilt that a crime has been committed. Neb. Rev. Stat. § 27-404(2) (Reissue 1985).
State v. Clancy 492

17. "(1) A statement is (a) an oral or written assertion or (b) nonverbal conduct of a person if it is intended by him as an assertion. . . . (3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Evid. R. 801 (Neb. Rev. Stat. § 27-801 (Reissue 1985)).
State v. Copple 672

18. Whether the State has established a prima facie case of conspiracy, thereby constituting anything within execution or furtherance of the common purpose as the act of every coconspirator, is a preliminary question for the trial court concerning admissibility of evidence. Neb. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)).
State v. Copple 672

19. When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given in evidence.
Chirnside v. Lincoln Tel. & Tel. Co. 784

20. Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. When this danger is not present it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to fail to exclude all the evidence.
Chirnside v. Lincoln Tel. & Tel. Co. 784

21. Error may not be predicated on a ruling which admits evidence unless a substantial right of a party is affected and a timely objection appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context. Neb. Evid. R. 103(1)(a) (Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1985)).
State v. Roggenkamp 914

Rules of the Supreme Court

1. Relief granted pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986) constitutes the disposition of a direct appeal on its merits.
   State v. Bean 278
2. In disposing of a case under Neb. Ct. R. of Prac. 3B (rev. 1986), the Nebraska Supreme Court examines the entire record, not only to resolve those matters which are specifically called to its attention by counsel but also to determine whether any possible errors exist.
   State v. Bean 278
3. Any matter which can be determined from the record on direct appeal is considered by the Nebraska Supreme Court when ruling on a motion filed pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986). Any such matter is not subject to relitigation in an action brought pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985).
   State v. Bean 278
   State v. Wilson 721

Sales

1. In order for a broker employed to secure a purchaser of realty to recover a commission, his or her efforts must be the efficient procuring cause of the sale.
   Marathon Realty Corp. v. Gavin 458
2. The efforts of a broker employed to secure a purchaser of realty have been the efficient procuring cause of the sale when the broker has secured a prospective purchaser who is ready, willing, and able to buy the property on terms and conditions upon which the broker is authorized to secure a purchaser, or on terms acceptable to the seller.
   Marathon Realty Corp. v. Gavin 458
3. Efforts which produce a series of unbroken, continuous events culminating in the sale of realty are the efficient procuring cause of the sale, notwithstanding the fact that such efforts may not be the sole cause of the sale.
   Marathon Realty Corp. v. Gavin 458
4. A broker is not entitled to a commission for producing a prospective buyer willing to execute only an option to purchase realty.
   Marathon Realty Corp. v. Gavin 458
5. Once an option to purchase is exercised, it becomes a contract for the purchase and sale of the realty.
   Marathon Realty Corp. v. Gavin 458
6. Neb. Rev. Stat. § 36-107 (Reissue 1984) requires that every contract between the owner and any broker or agent employed to sell land is void unless the contract is in writing and subscribed by both the owner and the broker or agent; the contract must also

describe the land to be sold and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.
Marathon Realty Corp. v. Gavin 458

7. One who is a joint owner of realty but represents himself or herself to be the sole owner thereof may not avoid full payment of an agreed commission on the ground that another also has an interest in the property.
Marathon Realty Corp. v. Gavin 458

8. A broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed or by said owner's inability to convey good title to real estate because of the failure to obtain a joinder in the conveyance by a third party who has an interest in the land.
Marathon Realty Corp. v. Gavin 458

Schools and School Districts

1. Notwithstanding that the statute provides that a school district is a body corporate, possesses the usual powers of a corporation for public purposes, and may sue and be sued, it is the law of this state that a school district may not maintain an action involving a change in the boundaries of a school district.
School Dist. No. 46 v. City of Bellevue 543

2. The fixing of boundaries of school districts is exclusively a legislative function, and it may be properly delegated to a subordinate agency, providing the Legislature prescribes the manner and the standards under which the power of the designated board may be exercised. The Legislature may delegate this authority provided it states the purpose for doing so and sets up reasonable standards to guide the agency which is to administer it.
School Dist. No. 46 v. City of Bellevue 543

Search and Seizure

1. Determinations as to whether a person has been seized, in the constitutional sense, are questions of fact.
State v. Bowersmith 6

2. Fourth amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.
State v. Kenny 638

3. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his fourth amendment rights infringed.
State v. Kenny 638

Second Injury Fund

1. Under the statutory scheme of Neb. Rev. Stat. § 48-128 (Reissue

1984), the amount payable from the Second Injury Fund is, ordinarily, the difference between the weekly benefits payable for permanent disability from a second injury which is compensable and the weekly benefits payable for the combined permanent disabilities from a previous injury and such second injury.
Norris v. Iowa Beef Processors 867

2. To recover from the Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1984), a claimant must prove by a preponderance of evidence (1) a prior permanent partial disability, (2) a second or subsequent injury which is compensable, causing permanent disability, and (3) the combination of permanent disabilities existing after such second or subsequent injury is substantially greater in degree or percentage than permanent disability from the second or subsequent injury, considered by itself and not in conjunction with the prior permanent disability.
Norris v. Iowa Beef Processors 867

3. One claiming against the Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1984), has the burden to prove that the combination of permanent disabilities is substantially greater in degree or percentage than the permanent disability from the second or subsequent compensable injury considered by itself.
Norris v. Iowa Beef Processors 867

4. Whether a combination of permanent disabilities, within the purview of Neb. Rev. Stat. § 48-128 (Reissue 1984), is substantially greater than permanent disability from a second or subsequent compensable injury is a question of fact.
Norris v. Iowa Beef Processors 867

5. With the exception of increased disability resulting from additional injury to the same specific member of the body, as classified by Neb. Rev. Stat. § 48-121(3) (Reissue 1984), *disability*, for the purpose of Neb. Rev. Stat. § 48-128 (Reissue 1984) means the decrease or loss of earning power (capacity) or diminished employability.
Norris v. Iowa Beef Processors 867

6. In addition to establishing an employee's decrease or loss of earning power or diminished employability, a claimant seeking payment from the Second Injury Fund must also establish that, after the second or subsequent compensable injury, an employee's combined permanent disabilities are *substantially greater* than the permanent disability from the last compensable injury considered by itself.
Norris v. Iowa Beef Processors 867

7. Under Neb. Rev. Stat. § 48-128 (Reissue 1984), a combination of permanent disabilities is "substantially greater" than permanent disability from the second or subsequent injury when the resulting permanent disability from all causes combined is substantially

greater than the disability resulting solely from the second or subsequent compensable injury.
Norris v. Iowa Beef Processors 867

8. For the combination of permanent disabilities necessary to sustain a claim against the Second Injury Fund, the prior permanent partial disability or disabilities must interact with the effects of the second or subsequent compensable injury and enhance the permanent disability that otherwise results from the later compensable injury alone.
Norris v. Iowa Beef Processors 867

Securities Regulation

The Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 et seq. (Reissue 1983), is not the exclusive remedy under Nebraska law in cases involving the sale of securities.
Knoell v. Huff 90

Security Interests

1. A guarantor, being one "who owes payment or other performance of the obligation secured," is a "debtor" as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980), and is thus entitled to notice of sale of collateral under the provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980).
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463

2. An ambiguity in a notice sent pursuant to the requirements of Neb. U.C.C. § 9-504(3) (Reissue 1980) is to be resolved against the drafter of the notice.
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463

3. A guarantee who holds an unconditional guaranty has no obligation to proceed against the security prior to seeking recovery under the guaranty contract.
Lease Northwest v. Davis 617

Self-Defense

One who knows he or she may retreat with complete safety may not resort to the use of deadly force in self-defense.
State v. Moniz 198

Self-Incrimination

1. The *Miranda* warnings are procedural safeguards intended to secure the privilege against compelled self-incrimination.
State v. Evans 64

2. Evidence obtained in the implied consent context is not testimonial or communicative and does not fall within the privilege against self-incrimination.
State v. Bishop 522

Sentences

1. Nebraska's escape statute, Neb. Rev. Stat. § 28-912 (Reissue 1985), defines one offense and sets out factors which, if present, change the range of the penalty.
State v. Heathman 19

2. A sentencing judge is not required to inform a criminal defendant that a sentence which need not be imposed consecutively to any other may nonetheless, in the judge's discretion, be so imposed.
State v. Suffredini 220

3. While a more severe punishment cannot be exacted because a defendant pleads not guilty and puts the State to the expense of a trial, a defendant nonetheless has no absolute right to a reduced sentence because he saves the State the expense of going to trial.
State v. Suffredini 220

4. Absent an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
State v. Suffredini 220
State v. Kane 245
State v. Kenny 638
State v. Gonzales 659
State v. Tweedy 715

5. The granting of probation as opposed to imposing a jail sentence is a matter left for the discretion of the trial court.
State v. Kane 245
State v. Tweedy 715

6. In a general sense an ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed.
State v. Palmer 282

7. Not all retroactive legislation is in violation of the prohibition against ex post facto laws.
State v. Palmer 282

8. A legislature may not enact any law which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed.
State v. Palmer 282

9. The traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.
State v. Palmer 282

10. The proportionality review made under the requirements of Neb. Rev. Stat. §§ 29-2521.01, 29-2521.02, and 29-2521.03 (Reissue 1985) is limited to a comparison of the facts and circumstances of the death penalty-imposed case under review with those of all applicable cases in which the death penalty was imposed.
State v. Palmer 282
State v. Joubert 411

11. Any serious assaultive or terrorizing criminal activity committed by the accused prior to the time of the offense may properly be considered when deciding the applicability of Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 1985).
State v. Joubert 411
12. A defendant may offer any evidence on the issue of mitigation, even though the mitigating factor is not specifically listed in Neb. Rev. Stat. § 29-2523(2) (Reissue 1985).
State v. Joubert 411
13. The balancing of aggravating circumstances against mitigating circumstances is not merely a matter of number counting but, rather, requires a careful weighing and examination of the various factors.
State v. Joubert 411
14. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), that a murder be "especially heinous, atrocious, cruel" or manifest "exceptional depravity by ordinary standards of morality and intelligence," describes in the disjunctive at least two distinct components of the aggravating circumstance which may operate in conjunction with or independent of one another.
State v. Joubert 411
15. The presence of any of the components of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) will sustain a finding that aggravating circumstance (1)(d) exists.
State v. Joubert 411
16. The words "especially heinous, atrocious, cruel," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), mean a conscienceless or pitiless crime which is unnecessarily torturous to the victim.
State v. Joubert 411
17. The phrase "exceptional depravity," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), refers and pertains to the state of mind of the actor and may be proved by or inferred from the defendant's conduct at or near the time of the offense.
State v. Joubert 411
18. For the purpose of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), "exceptional depravity" exists when the act is totally and senselessly bereft of any regard for human life as shown by the presence of the following circumstances, either separately or collectively: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim. Consequently, where one or more of those five factors are present, there may be a finding of "exceptional depravity."
State v. Joubert 411
19. An offense for which the maximum penalty is imprisonment for

more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.
State v. Lafler 613

20. A law which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed is an ex post facto law and insofar as it affects the punishment of the party to his disadvantage is void.
State v. Duran 774

21. Restitution ordered by a court pursuant to Neb. Rev. Stat. § 29-2280 (Cum. Supp. 1986) is a criminal penalty imposed as punishment for the crime, not an administrative or civil penalty as is restitution under Neb. Rev. Stat. § 28-427 (Reissue 1985).
State v. Duran 774

22. A court is without authority to impose a criminal penalty for a crime unless the law authorizing such penalty was effective on or before the date of the commission of the crime.
State v. Duran 774

23. Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.
State v. Painter 905
State v. Thompson 922

24. The State has the right to appeal a district court modification of a sentence imposed by a county court.
State v. Thompson 922

Service of Process

1. A reasonably diligent search for the purpose of justifying service by publication does not require the use of all possible or conceivable means of discovery, but is such an inquiry as a reasonably prudent person would make in view of the circumstances and must extend to those places where information is likely to be obtained and to those persons who, in the ordinary course of events, would be likely to receive news of or from the absent person.
In re Interest of A.W. 764

2. Whether all reasonable means to qualify a search as a "reasonably diligent" one have been exhausted must be determined by the circumstances of each particular case.
In re Interest of A.W. 764

Sexual Assault

A victim need not be independently corroborated on the particular acts constituting a sexual assault, but must be corroborated on the

material circumstances and facts tending to support the victim's testimony.
State v. Polyascko 272

Speedy Trial

1. The right to a speedy trial does not include the time after the defendant has been found guilty and before he is sentenced.
State v. Jameson 38
2. With certain periods of exclusion, Neb. Rev. Stat. § 29-1207 (Reissue 1985) requires that persons indicted or informed against for any offense be tried within 6 months of the filing of the information.
State v. Wilcox 138
3. Generally, the time from filing to final disposition of the defendant's pretrial motions is excluded in calculating the last permissible day for trial. Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1985).
State v. Wilcox 138
4. Judicial delay, absent a showing of good cause, does not toll the speedy trial statute.
State v. Wilcox 138
5. Regarding tolling of the speedy trial statute, the State has the burden to establish that the time comes within one of the exclusions; a failure to carry that burden warrants reversal.
State v. Wilcox 138
6. The right to a speedy trial does not grant a defendant the right to demand immediate attention or first priority.
State v. Wilcox 138
7. A defendant must accept delay as a consequence of making pretrial motions, where delay is not inordinate or unreasonable.
State v. Wilcox 138
8. Where a single pretrial motion of the defendant was under advisement for more than 1 year 3 months 23 days, the defendant was subjected to unreasonable, inordinate delay.
State v. Wilcox 138
9. The defendant is entitled to discharge of the offense charged where he was not tried within 6 months of the filing of the information. Neb. Rev. Stat. § 29-1208 (Reissue 1985).
State v. Wilcox 138

Standing

1. Notwithstanding that the statute provides that a school district is a body corporate, possesses the usual powers of a corporation for public purposes, and may sue and be sued, it is the law of this state that a school district may not maintain an action involving a change in the boundaries of a school district.
School Dist. No. 46 v. City of Bellevue 543
2. Irrespective of standing to challenge a statute for vagueness, an

individual may have standing to assert that a statute is overbroad when such statute reaches a substantial amount of constitutionally protected conduct.
State v. Copple 672

3. In determining whether standing exists for a facial challenge to a statute as overbroad, a court must first determine whether the statute reaches a substantial amount of constitutionally protected conduct. If the statutory proscription does not reach a substantial amount of constitutionally protected conduct, there is no standing to challenge a statute on the basis that the statute is overbroad, and such challenge must fail.
State v. Copple 672

4. In order to have standing to challenge a statute on the ground of vagueness, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of a law as applied to the conduct of others.
State v. Copple 672

Statutes

1. Where the same word is used repeatedly in the same act, unless the context requires otherwise, the word is to have the same meaning.
Knoell v. Huff 90

2. The Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984), must be liberally construed to accomplish its purposes serving the best interests of juveniles within the act.
In re Interest of L.D. et al. 249

3. In a general sense an ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed.
State v. Palmer 282

4. Not all retroactive legislation is in violation of the prohibition against ex post facto laws.
State v. Palmer 282

5. A legislature may not enact any law which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed.
State v. Palmer 282

6. Statutes which simply enlarge the class of person who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage, for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree, or lessen the amount or measure, of the

proof which was made necessary to conviction when the crime was committed.
State v. Palmer 282
7. In the absence of anything indicating the contrary, statutory language is to be given its plain and ordinary meaning.
State v. Palmer 282
8. Where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language.
State v. Palmer 282
Watson v. Avco Financial Servs. 778
9. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), that a murder be "especially heinous, atrocious, cruel" or "manifest exceptional depravity by ordinary standards of morality and intelligence," describes in the disjunctive at least two distinct components of the aggravating circumstance which may operate in conjunction with or independent of one another.
State v. Palmer 282
10. Penal statutes are to be strictly construed, and it is not for us to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.
State v. Steele 476
11. A provision of a statute which does not relate to the essence of the thing to be done but governs the time or manner of performance is generally considered to be directory as opposed to mandatory.
State v. Steele 476
12. If the statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end.
School Dist. No. 46 v. City of Bellevue 543
13. If the legislature has made a reasonable classification, one that is not a mere cloak or cover for an arbitrary exemption of certain persons or a certain class of persons, but a natural and proper selection of those who, upon a reasonable view of the mischiefs to be met, should be subject to the regulations prescribed, and the law is made to operate generally and uniformly upon all of the class so constituted, the constitutional provision in question is not violated.
School Dist. No. 46 v. City of Bellevue 543
14. One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent.
County of Lancaster v. Maser 566
15. When statutory language is ambiguous and must be construed,

recourse should be had to the legislative history for the purpose of discovering the intent of the lawmakers.
County of Lancaster v. Maser 566

16. In determining the intent of the Legislature, the Supreme Court considers the history of the legislation and the reasonableness of an interpretation, weighed against an unreasonable or absurd construction evidently not intended by the Legislature.
County of Lancaster v. Maser 566

17. Legislative history includes the record of a floor explanation or debate, which is an extrinsic, secondary source in statutory interpretation.
County of Lancaster v. Maser 566

18. Unless a cancellation statute is manifestly all-inclusive, a statute specifying the instances under which a party to an insurance contract may cancel it does not make cancellation the exclusive remedy, and it is not in derogation of other remedial rights which are recognized and implemented by other provisions of law.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

19. A statute which is clear and precise, and therefore not vague, may nonetheless fail to pass constitutional muster by virtue of being overbroad in the sense that it prohibits the exercise of constitutionally protected conduct.
State v. Copple 672

20. Irrespective of standing to challenge a statute for vagueness, an individual may have standing to assert that a statute is overbroad when such statute reaches a substantial amount of constitutionally protected conduct.
State v. Copple 672

21. In determining whether standing exists for a facial challenge to a statute as overbroad, a court must first determine whether the statute reaches a substantial amount of constitutionally protected conduct. If the statutory proscription does not reach a substantial amount of constitutionally protected conduct, there is no standing to challenge a statute on the basis that the statute is overbroad, and such challenge must fail.
State v. Copple 672

22. In order to have standing to challenge a statute on the ground of vagueness, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of a law as applied to the conduct of others.
State v. Copple 672

23. An essential purpose of a penal statute is to provide notice to the ordinary person concerning conduct which is proscribed as criminal. When a penal statute supplies an ordinary person with notice concerning conduct forbidden as criminal, such statute

meets the constitutional standard of due process.
State v. Copple 672

24. Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.
State v. Painter 905
State v. Thompson 922

Stipulations

1. An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted, so that the one party need offer no evidence to prove it and the other is not allowed to disprove it.
State v. Davis 205

2. A concession or stipulation as to a fact made for the purpose of trial has the force and effect of an established fact, binding on the party making the same as well as on the court, unless the court in its reasonable discretion allows the concession to be later withdrawn, explained, or modified if it appears to have been made by improvidence or mistake.
State v. Davis 205

3. Parties are bound by stipulations voluntarily made, and relief from such stipulations after judgment is warranted only under exceptional circumstances.
State v. Davis 205

4. An accused may by stipulation waive the necessity of proof of all or any part of the case which the State has alleged against him and having done so, he cannot complain of evidence which he has stipulated into the record.
State v. Davis 205

5. A party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with such stipulation.
State v. Roggenkamp 914

Summary Judgment

1. Summary judgment is to be granted to the moving party where there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and the moving party is entitled to judgment as a matter of law.
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463
Naidoo v. Union Pacific Railroad 853

2. In considering a motion for summary judgment, the evidence is to

be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence.
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463
Naidoo v. Union Pacific Railroad 853

3. The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; that party must therefore produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463
Naidoo v. Union Pacific Railroad 853

4. The requirements to sustain a motion for summary judgment are the same whether one party or both parties have moved for summary judgment. Those requirements are that there be no genuine issue of material fact, nor any genuine issue regarding the ultimate inferences to be drawn therefrom, and that the moving party is entitled to judgment as a matter of law.
Bohannon v. Guardsman Life Ins. Co. 701

Supreme Court

1. The proportionality review made under the requirements of Neb. Rev. Stat. §§ 29-2521.01, 29-2521.02, and 29-2521.03 (Reissue 1985) is limited to a comparison of the facts and circumstances of the death penalty-imposed case under review with those of all applicable cases in which the death penalty was imposed.
State v. Palmer 282

2. The Nebraska Supreme Court acquires no jurisdiction of a cause appealed from a tribunal which lacked subject matter jurisdiction.
In re Complaint of Fecht 752

Taxation

1. A property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization. An appeal may then be taken to the district court from the order of the county board of equalization fixing the assessed value of the property.
Olson v. County of Dakota 516

2. A collateral attack on valuation of property for tax purposes is permissible only if the assessment is partially or entirely void.
Olson v. County of Dakota 516

Tax Sale

The time for redemption, as such phrase is used in Neb. Rev. Stat. § 77-1902 (Reissue 1986), is the 3 years immediately following a delinquent tax sale. An action to foreclose a tax lien pursuant

to § 77-1902 can only be brought within the 90 days immediately after expiration of the time for redemption.
County of Lancaster v. Maser 566

Termination of Employment

When an employee of the city, whose duties in part are to help apprehend persons using marijuana, himself engages in such activity, such action does constitute an act unbecoming an incumbent of the particular position, does affect the efficient conduct of the business of the city, and is not in the best interest of the city government.
Ostwald v. City of Omaha 530

Theft

Where value of goods is an element of the crime charged and there is a market for the goods, the value to be proved is the market value at the time and place of the alleged crime.
State v. Clancy 492

Time

1. The right to a speedy trial does not include the time after the defendant has been found guilty and before he is sentenced.
State v. Jameson 38
2. The time for redemption, as such phrase is used in Neb. Rev. Stat. § 77-1902 (Reissue 1986), is the 3 years immediately following a delinquent tax sale. An action to foreclose a tax lien pursuant to § 77-1902 can only be brought within the 90 days immediately after expiration of the time for redemption.
County of Lancaster v. Maser 566
3. A guarantor is not discharged by an extension of time for payment or performance of the principal obligation if he consents thereto, as where the contract of guaranty expressly or impliedly provides for the extension.
First Nat. Bank v. Benedict Consol. Indus. 860

Trial

1. Ordinarily, the overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve error.
State v. Borchardt 47
2. One wishing to preserve error on the basis of remarks contained in an opening statement generally must object to the questioned remarks when made, notwithstanding the overruling of a motion in limine.
State v. Borchardt 47
3. A litigant may rely on a trial judge's announcement of what he or she will permit an opponent to do.
State v. Borchardt 47

4. Evidence of a test result cannot be characterized as "scientific" or qualify as "technical or other specialized knowledge," and thus within the purview of Neb. Rev. Stat. § 27-702 (Reissue 1985), unless and until it is established that the test result demonstrates what it is claimed to demonstrate.
State v. Borchardt 47

5. In resolving a challenge to the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such is for the trier of fact and must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Borchardt 47

6. The decision as to whether to call a witness is a matter of trial strategy within counsel's judgment.
State v. Evans 64

7. In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985) for postconviction relief, the trial judge, as the "trier of fact," resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony.
State v. Williams 114

8. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the witness' testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)).
State v. Williams 114

9. A valid guilty plea waives the right to a trial, whether a trial by jury or without a jury, and waives the right to counsel, including the right to court-appointed counsel in an otherwise appropriate case.
State v. Kennedy 164

10. The admission or exclusion of evidence is a matter left largely to the sound discretion of the trial judge.
State v. Kern 177

11. Where first degree murder is charged, the elements of both premeditation and intent are for the jury.
State v. Kern 177

12. An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted, so that the one party need offer no evidence to prove it and the other is not allowed to disprove it.
State v. Davis 205

13. A concession or stipulation as to a fact made for the purpose of trial has the force and effect of an established fact, binding on the party making the same as well as on the court, unless the court in its reasonable discretion allows the concession to be later withdrawn, explained, or modified if it appears to have been made by improvidence or mistake.
State v. Davis 205
14. Parties are bound by stipulations voluntarily made, and relief from such stipulations after judgment is warranted only under exceptional circumstances.
State v. Davis 205
15. An accused may by stipulation waive the necessity of proof of all or any part of the case which the State has alleged against him and having done so, he cannot complain of evidence which he has stipulated into the record.
State v. Davis 205
16. While a more severe punishment cannot be exacted because a defendant pleads not guilty and puts the State to the expense of a trial, a defendant nonetheless has no absolute right to a reduced sentence because he saves the State the expense of going to trial.
State v. Suffredini 220
17. No one has a vested right in a procedure; procedural matters can be changed at any time before trial and are binding on the defendant.
State v. Palmer 282
18. The receipt of evidence which may later be excluded because of a difficult or complicated rule of law does not constitute judicial misconduct.
State v. Palmer 282
19. Determinations as to the qualifications of a person to be a witness or the admissibility of evidence are matters left to the sound discretion of the trial court, whose rulings will not be upset absent an abuse of discretion.
State v. Burchett 444
State v. Clancy 492
20. The decision to call, or not to call, a particular witness is a matter of trial strategy. Even if that choice proves ineffective, it will not, without more, sustain a finding of ineffectiveness of counsel.
State v. Fries 482
21. Lack of jury members of the same race as the defendant, standing alone, does not support a claim of improper racial composition of the jury.
State v. Falkner 490
22. All that the Constitution forbids is systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels. The burden is

on the defendant to allege and prove such systematic exclusion.
State v. Falkner 490

23. Generally, this court will not consider for the first time on appeal issues not properly raised in the pleadings nor litigated at trial.
Leseberg v. Meints 533

24. "(1) A statement is (a) an oral or written assertion or (b) nonverbal conduct of a person if it is intended by him as an assertion. . . . (3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Evid. R. 801 (Neb. Rev. Stat. § 27-801 (Reissue 1985)).
State v. Copple 672

25. Prima facie proof of a case is less stringent than proof by a preponderance of the evidence. A "prima facie" case requires only enough evidence to take the question to the jury, whereas "preponderance of the evidence" requires proof which leads the jury to find the existence of the contested fact is more probable than its nonexistence.
State v. Copple 672

26. When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given in evidence.
Chirnside v. Lincoln Tel. & Tel. Co. 784

27. Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. When this danger is not present it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to fail to exclude all the evidence.
Chirnside v. Lincoln Tel. & Tel. Co. 784

28. Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion, and where the opinion is based on the facts shown not to be true the opinion lacks probative value.
Latek v. K Mart Corp. 807

29. In a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal.
State v. Pointer 892
State v. Roggenkamp 914

30. It is within the sound discretion of the trial court to allow testimony from a witness who is in violation of a sequestration order.
State v. Pointer 892

31. Error may not be predicated on a ruling which admits evidence unless a substantial right of a party is affected and a timely objection appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context. Neb. Evid. R. 103(1)(a) (Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1985)).
State v. Roggenkamp 914

32. If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error.
State v. Roggenkamp 914

33. A party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with such stipulation.
State v. Roggenkamp 914

Trusts

1. One who claims the existence of a constructive trust has the burden of proof to establish the existence of a constructive trust by evidence which is clear, satisfactory, and convincing in character.
In re Estate of Redpath 845

2. As a general rule, provided the property can be traced or identified, any third person who has obtained trust property or its product by a transfer made in violation of the trust may be subject to a constructive trust. It is necessary, however, that the property can be traced or identified.
In re Estate of Redpath 845

3. If the trustee makes a withdrawal from the mixed account for an admittedly personal purpose, for example, to pay his living expenses or his individual debts, or for an unknown purpose, such withdrawal will be charged to the personal part of the account as long as there remains any cash or credit in such personal portion of the account. It will be only after the personal credit or cash is exhausted that withdrawals for personal or unknown purposes will be charged to the trust side of the account.
In re Estate of Redpath 845

4. When a trustee wrongfully commingles trust money with his own and makes payments from the common fund, it will be presumed that he paid out his own money, and not the trust money.
In re Estate of Redpath 845

Uniform Commercial Code

1. A guarantor, being one "who owes payment or other performance of the obligation secured," is a "debtor" as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980), and is thus entitled to notice

of sale of collateral under the provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980).
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463

2. An ambiguity in a notice sent pursuant to the requirements of Neb. U.C.C. § 9-504(3) (Reissue 1980) is to be resolved against the drafter of the notice.
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463

Valuation

1. A property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization. An appeal may then be taken to the district court from the order of the county board of equalization fixing the assessed value of the property.
Olson v. County of Dakota 516

2. A collateral attack on valuation of property for tax purposes is permissible only if the assessment is partially or entirely void.
Olson v. County of Dakota 516

Value of Goods

Where value of goods is an element of the crime charged and there is a market for the goods, the value to be proved is the market value at the time and place of the alleged crime.
State v. Clancy 492

Vendor and Vendee

In order to maintain an action for damages for fraudulent concealment or false representation by suppression or concealment in the vendor/purchaser setting, the plaintiff must allege and prove by a preponderance of the evidence the following elements: (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.
Nelson v. Cheney 756

Venue

1. To secure a change of venue the defendant must show that pretrial publicity has made it impossible to secure a fair and impartial jury.
State v. Heathman 19

2. A motion for change of venue filed pursuant to Neb. Rev. Stat. § 29-1301.01 (Reissue 1985) is addressed to the sound discretion of the trial court, whose ruling will not be disturbed absent a clear abuse of that discretion.
State v. Kern 177

3. A trial court abuses its discretion in denying a motion for change of venue where the defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial.
State v. Kern 177

4. The factors used to determine whether a change of venue should have been granted due to pretrial publicity include the nature of the publicity; the degree to which the publicity has circulated throughout the community; the degree to which the publicity circulated in areas to which venue could be changed; the length of time between the dissemination of the publicity complained of and the date of trial; the care exercised and ease encountered in selection of the jury; the number of challenges exercised during the voir dire; the severity of the offense charged; and the size of the area from which the venire is drawn.
State v. Kern 177

Verdicts

1. After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if the evidence sustains some rational theory of guilt.
State v. Borchardt 47
State v. Painter 905

2. In reviewing the sufficiency of the evidence, it is not within this court's province to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Baker 130
State v. Palmer 282
State v. Burchett 444

3. After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustains some rational theory of guilt.
State v. Kern 177

4. A guilty verdict will not be reversed by this court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law.
State v. Painter 905

Wages

The wage rate is to be computed according to the contract of hire in force at the time of the accident.
Hayes v. A.M. Cohron, Inc. 579

Waiver

1. A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
   State v. Kennedy 164
2. A voluntary waiver, knowingly and intelligently made, must affirmatively appear from the record, before a court may conclude that a defendant has waived a right constitutionally guaranteed or granted by statute.
   State v. Kennedy 164
3. A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional, except the defense that the indictment, information, or complaint is not sufficient to charge an offense.
   State v. Kennedy 164
4. A valid guilty plea waives the right to a trial, whether a trial by jury or without a jury, and waives the right to counsel, including the right to court-appointed counsel in an otherwise appropriate case.
   State v. Kennedy 164
5. An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted, so that the one party need offer no evidence to prove it and the other is not allowed to disprove it.
   State v. Davis 205
6. A concession or stipulation as to a fact made for the purpose of trial has the force and effect of an established fact, binding on the party making the same as well as on the court, unless the court in its reasonable discretion allows the concession to be later withdrawn, explained, or modified if it appears to have been made by improvidence or mistake.
   State v. Davis 205
7. Parties are bound by stipulations voluntarily made, and relief from such stipulations after judgment is warranted only under exceptional circumstances.
   State v. Davis 205
8. An accused may by stipulation waive the necessity of proof of all or any part of the case which the State has alleged against him and having done so, he cannot complain of evidence which he has stipulated into the record.
   State v. Davis 205
9. As any other formal matter, an absence of, or defect in, verification is waived by failure to make a proper and timely objection.
   In re Interest of L.D. et al. 249

10. A sufficiently complete checklist or other docket entry may be used to establish a valid waiver of counsel for enhancement purposes.
State v. Foster 267

11. To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction. Other objections to the validity of such prior conviction constitute collateral attacks on that prior conviction and must be raised either by direct appeal from the prior conviction or in separate proceedings commenced expressly for the purpose of setting aside such prior conviction as an invalid judgment.
State v. Davis 518

12. A voluntary waiver of the constitutional right to a jury trial must be express and intelligent.
State v. Bishop 522

13. A demand is required to invoke the statutory right to a jury trial for a petty offense in county court. A failure to file a timely request in accordance with the rules of court constitutes a waiver of the statutory right to a jury trial.
State v. Bishop 522
State v. Lafler 613

14. A waiver of the constitutional right to a jury trial cannot be presumed from a silent record.
State v. Lafler 613

15. Some act or conduct amounting to a recognition of the continued validity of an insurance policy as a binding obligation upon an insurer is necessary to constitute an effective waiver of the policy provision for forfeiture for nonpayment of premiums.
Bohannon v. Guardsman Life Ins. Co. 701

16. An insurer, with full knowledge of the nonpayment of a monthly premium, which nevertheless demands and receives payment of the premium for the succeeding month, may have waived the policy provision for forfeiture for nonpayment of the preceding monthly premium.
Bohannon v. Guardsman Life Ins. Co. 701

Wills

1. The cardinal rule concerning a decedent's will is the requirement that the intention of the testator or testatrix shall be given effect, unless the maker of the will attempts to accomplish a purpose, or to make a disposition, contrary to some rule of law or public policy.
In re Estate of Walker 812

2. To arrive at a testator's or testatrix's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in a will, employ the generally accepted literal and grammatical meaning of words used in the

will, and assume that the maker of the will understood words stated in the will.
In re Estate of Walker 812

3. When language in a will is clear and unambiguous, construction of a will is unnecessary and impermissible. As a corollary of this rule, when ambiguity exists in a testamentary provision, construction of a will is necessary.
In re Estate of Walker 812

4. Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings.
In re Estate of Walker 812

5. A patent ambiguity is one which exists on the face of an instrument.
In re Estate of Walker 812

6. *Construction* includes the process of determining the correct sense, real meaning, or proper explanation of an ambiguous term, phrase, or provision in a written instrument.
In re Estate of Walker 812

7. When patent ambiguity exists in a will, a court must resolve such ambiguity as a matter of law.
In re Estate of Walker 812

8. Neb. Rev. Stat. § 24-519 (Reissue 1985) expressly denies to an associate county judge who is not an attorney at law the power to construe a will.
In re Estate of Walker 812

Witnesses

1. The decision as to whether to call a witness is a matter of trial strategy within counsel's judgment.
State v. Evans 64

2. In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985) for postconviction relief, the trial judge, as the "trier of fact," resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony.
State v. Williams 114

3. The credibility of a witness may be attacked by any party, including the party calling him. Neb. Evid. R. 607 (Neb. Rev. Stat. § 27-607 (Reissue 1985)).
State v. Williams 114

4. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the witness' testimony and was given under oath subject to the penalty of

perjury at a trial, hearing, or other proceeding, or in a deposition. Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)).
State v. Williams 114

5. Subject to the exception specified in Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)), a witness' inconsistent statement may be admissible evidence to aid the jury in evaluating that witness' credibility, but a witness' inconsistent statement is not substantive evidence of the matter asserted unless such statement is otherwise admissible under the Nebraska Evidence Rules.
State v. Williams 114

6. Witness credibility and the weight to be given a witness' testimony are matters for evaluation and determination by the jury.
State v. Williams 114

7. A witness is not rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case. Such a witness may testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis.
State v. Palmer 282

8. In a prosecution for a crime of violence, the defendant's spouse may be called to testify against the defendant as to any matter, including confidential communications. Neb. Rev. Stat. § 27-505(3)(a) (Reissue 1985).
State v. Burchett 444

9. An accomplice's testimony is admissible notwithstanding the fact that the testimony is procured by means of a plea bargain.
State v. Burchett 444

10. The promise of leniency or otherwise favorable prosecutorial treatment goes only to the credibility of the accomplice's testimony, not to its admissibility.
State v. Burchett 444

11. Generally, it is only where the prosecution has bargained for false or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require its preclusion.
State v. Burchett 444

12. Determinations as to the qualifications of a person to be a witness or the admissibility of evidence are matters left to the sound discretion of the trial court, whose rulings will not be upset absent an abuse of discretion.
State v. Burchett 444

13. The decision to call, or not to call, a particular witness is a matter of trial strategy. Even if that choice proves ineffective, it will not, without more, sustain a finding of ineffectiveness of counsel.
State v. Fries 482

14. Under Neb. Evid. R. 404(2), a defendant's attempted intimidation or intimidation of a State's informant or witness is relevant evidence concerning the defendant's conscious guilt that a crime has been committed. Neb. Rev. Stat. § 27-404(2) (Reissue 1985).
State v. Clancy 492

15. At a hearing to determine whether the State had violated its agreement for immunity and restricted evidence or information, the State must present a prima facie case that it has fulfilled its agreement with the defendant, that is, demonstrate that the State's evidence, to be adduced at the defendant's trial, was obtained from a source or sources independent of the defendant and not by direct or indirect use of information obtained from the defendant as the result of defendant's agreement for immunity and restricted evidence or information.
State v. Copple 672

16. Whether a witness is qualified as an expert is a preliminary question for a trial court. Neb. Evid. R. 104(1) (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)). Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion.
State v. Copple 672

17. As the "trier of fact," the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony. Entering into a resolution by the Workers' Compensation Court regarding any conflict of evidence are factors such as the respective interests of the parties in the lawsuit; demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses was corroborated; and the reasonableness or unreasonableness of statements of such witnesses.
Norris v. Iowa Beef Processors 867

18. It is within the sound discretion of the trial court to allow testimony from a witness who is in violation of a sequestration order.
State v. Pointer 892

Words and Phrases

1. Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."
State v. Bowersmith 6

2. Intent is the state of mind operative at the time of an action.
State v. Robb 14

3. Evidence of a test result cannot be characterized as "scientific" or qualify as "technical or other specialized knowledge," and thus within the purview of Neb. Rev. Stat. § 27-702 (Reissue 1985), unless and until it is established that the test result demonstrates what it is claimed to demonstrate.
State v. Borchardt 47
4. The language of Neb. Rev. Stat. § 28-907(1)(a) (Reissue 1985), "to impede the investigation of an actual criminal matter," includes the impeding of the gathering of information as to the identity of a defendant named in an arrest warrant.
State v. Nissen 60
5. In cases of alleged ineffective assistance of counsel, prejudice has been characterized as a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
State v. Williams 114
6. A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
State v. Kennedy 164
7. A petition, as a pleading, is a plaintiff's or claimant's written statement of fact which invokes the jurisdiction of a court, sets out a cause of action, and seeks relief.
In re Interest of L.D. et al. 249
8. A "crime" is an act or omission for which one is subject to punishment by public authority.
State v. Palmer 282
9. "Violence" is the exertion of physical force so as to injure or abuse.
State v. Palmer 282
10. "Crime of violence" is an act which injures or abuses through the use of physical force and which subjects the actor to punishment by public authority.
State v. Palmer 282
11. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), that a murder be "especially heinous, atrocious, cruel" or "manifest exceptional depravity by ordinary standards of morality and intelligence," describes in the disjunctive at least two distinct components of the aggravating circumstance which may operate in conjunction with or independent of one another.
State v. Palmer 282
12. The words "especially heinous, atrocious, cruel," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), mean a conscienceless or pitiless crime which is unnecessarily torturous to the victim.
State v. Palmer 282

13. The phrase "exceptional depravity," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), refers and pertains to the state of mind of the actor and may be proved by or inferred from the defendant's conduct at or near the time of the offense.
State v. Palmer 282

14. For the purpose of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), "exceptional depravity" exists when the act is totally and senselessly bereft of any regard for human life as shown by the presence of the following circumstances, either separately or collectively: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim.
State v. Palmer 282

15. A guarantor, being one "who owes payment or other performance of the obligation secured," is a "debtor" as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980), and is thus entitled to notice of sale of collateral under the provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980).
Deutsche Credit Corp. v. Hi-Bo Farms, Inc. 463

16. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1985)).
State v. Clancy 492
State v. Copple 672

17. The definition of "accident," as used in Neb. Rev. Stat. § 48-101 (Reissue 1984), includes injuries resulting from activities which create a series of repeated traumas ultimately producing disability.
Hayes v. A.M. Cohron, Inc. 579

18. The meaning of words used by medical experts at times presents a problem of interpretation which may be resolved by the sense in which they were used.
Hayes v. A.M. Cohron, Inc. 579

19. The cancellation of an insurance policy is not a rescission, since a rescission avoids the contract ab initio. A cancellation merely terminates the policy as of the time when the cancellation becomes effective.
Glockel v. State Farm Mut. Auto. Ins. Co. 598

20. Indigency, as used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), means the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family.
State v. Lafler 613

21. A demurrer ore tenus is an objection to the receipt of evidence.
Lease Northwest v. Davis 617

22. "(1) A statement is (a) an oral or written assertion or (b) nonverbal conduct of a person if it is intended by him as an assertion. . . . (3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Evid. R. 801 (Neb. Rev. Stat. § 27-801 (Reissue 1985)).
State v. Copple 672

23. *Conceal* means to hide, secrete, or withhold from knowledge of others; to withhold from utterance or declaration; to cover or keep from sight; to hide or withdraw from observation, cover or keep from sight, or prevent discovery. The word *conceal* pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact and has reference to some advantage to the concealing party or a disadvantage to some interested party from whom the fact is withheld.
State v. Copple 672

24. As used in Neb. Rev. Stat. § 39-669.07 (Reissue 1984), the phrase "under the influence of alcoholic liquor" means after the ingestion of alcohol in an amount sufficient to impair to any appreciable degree the ability to operate a motor vehicle in a prudent and cautious manner.
State v. Burling 725

25. "Competent evidence" is that which tends to establish the fact in issue; that which is admissible and relevant on the point in issue.
State v. Burling 725

26. Under Neb. Rev. Stat. § 48-1101 (Reissue 1984), "disability" designates a protected class regarding employment in Nebraska. By virtue of Neb. Rev. Stat. § 48-1102(8) (Reissue 1984), "epilepsy" is included within the definition of a "disability," but only if such epilepsy is "unrelated to such person's ability to engage in a particular occupation."
Father Flanagan's Boys' Home v. Goerke 731

27. The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another.
Steed v. Oak Ridge Equestrian Ctr. 792

28. Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings.
In re Estate of Walker 812

29. A patent ambiguity is one which exists on the face of an instrument.
In re Estate of Walker 812

30. *Construction* includes the process of determining the correct sense, real meaning, or proper explanation of an ambiguous term,

phrase, or provision in a written instrument.
In re Estate of Walker 812

31. A judgment is the final consideration and determination of a court on matters submitted to it in an action or proceeding.
Black v. Sioux City Foundry Co. 824

32. With the exception of increased disability resulting from additional injury to the same specific member of the body, as classified by Neb. Rev. Stat. § 48-121(3) (Reissue 1984), *disability*, for the purpose of Neb. Rev. Stat. § 48-128 (Reissue 1984) means the decrease or loss of earning power (capacity) or diminished employability.
Norris v. Iowa Beef Processors 867

33. Under Neb. Rev. Stat. § 48-128 (Reissue 1984), a combination of permanent disabilities is "substantially greater" than permanent disability from the second or subsequent injury when the resulting permanent disability from all causes combined is substantially greater than the disability resulting solely from the second or subsequent compensable injury.
Norris v. Iowa Beef Processors 867

Workers' Compensation

1. The definition of "accident," as used in Neb. Rev. Stat. § 48-101 (Reissue 1984), includes injuries resulting from activities which create a series of repeated traumas ultimately producing disability.
Hayes v. A.M. Cohron, Inc. 579

2. Neb. Rev. Stat. § 48-168 (Reissue 1984) provides, among other things, that the compensation court shall not be bound by any technical or formal rules of procedure.
Hayes v. A.M. Cohron, Inc. 579

3. A workers' compensation plaintiff has the burden of proving that an injury resulted from an accident arising out of and in the course of employment.
Hayes v. A.M. Cohron, Inc. 579

4. If it is claimed that the injury was the result of employment exertion, the evidence must show that the employment contributed to the cause of the injury in some material and substantial degree.
Hayes v. A.M. Cohron, Inc. 579

5. The presence of a preexisting condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment.
Hayes v. A.M. Cohron, Inc. 579

6. The wage rate is to be computed according to the contract of hire in force at the time of the accident.
Hayes v. A.M. Cohron, Inc. 579

7. The findings of fact made by the compensation court have the

same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
Bender v. Norfolk Iron & Metal Co. 706
Norris v. Iowa Beef Processors 867

8. The right of an injured workman to receive vocational rehabilitation benefits depends upon his inability to perform work for which he has previous training and experience.
Bender v. Norfolk Iron & Metal Co. 706

9. Factual determinations of the Workers' Compensation Court will not be set aside on appeal unless they are clearly wrong.
Ward v. City of Mitchell 711

10. We must consider the evidence in the light most favorable to the successful party, when testing the sufficiency of the evidence supporting the Workers' Compensation Court's findings of fact.
Ward v. City of Mitchell 711
Norris v. Iowa Beef Processors 867

11. When the record presents nothing more than conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workers' Compensation Court.
Ward v. City of Mitchell 711

12. There is no procedure under the Nebraska Workers' Compensation Act which authorizes the compensation court to clarify an award on rehearing when more than 10 days have elapsed from the date on which the findings were made in the rehearing.
Black v. Sioux City Foundry Co. 824

13. In the absence of specific statutory authority to correct an ambiguity by a procedure other than as described in Neb. Rev. Stat. § 48-180 (Reissue 1984), the compensation court does not have authority to enter an order revising one of its awards.
Black v. Sioux City Foundry Co. 824

14. Under the statutory scheme of Neb. Rev. Stat. § 48-128 (Reissue 1984), the amount payable from the Second Injury Fund is, ordinarily, the difference between the weekly benefits payable for permanent disability from a second injury which is compensable and the weekly benefits payable for the combined permanent disabilities from a previous injury and such second injury.
Norris v. Iowa Beef Processors 867

15. To recover from the Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1984), a claimant must prove by a preponderance of evidence (1) a prior permanent partial disability, (2) a second or subsequent injury which is compensable, causing permanent disability, and (3) the combination of permanent disabilities existing after such second or subsequent injury is substantially greater in degree or percentage than permanent disability from the second or subsequent injury, considered by itself and not in

conjunction with the prior permanent disability.
Norris v. Iowa Beef Processors 867
16. One claiming against the Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1984), has the burden to prove that the combination of permanent disabilities is substantially greater in degree or percentage than the permanent disability from the second or subsequent compensable injury considered by itself.
Norris v. Iowa Beef Processors 867
17. Whether a combination of permanent disabilities, within the purview of Neb. Rev. Stat. § 48-128 (Reissue 1984), is substantially greater than permanent disability from a second or subsequent compensable injury is a question of fact.
Norris v. Iowa Beef Processors 867
18. Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly wrong. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, Neb. Rev. Stat. § 48-185 (Reissue 1984) precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court.
Norris v. Iowa Beef Processors 867
19. As the "trier of fact," the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony. Entering into a resolution by the Workers' Compensation Court regarding any conflict of evidence are factors such as the respective interests of the parties in the lawsuit; demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses was corroborated; and the reasonableness or unreasonableness of statements of such witnesses.
Norris v. Iowa Beef Processors 867
20. With the exception of increased disability resulting from additional injury to the same specific member of the body, as classified by Neb. Rev. Stat. § 48-121(3) (Reissue 1984), *disability*, for the purpose of Neb. Rev. Stat. § 48-128 (Reissue 1984) means the decrease or loss of earning power (capacity) or diminished employability.
Norris v. Iowa Beef Processors 867
21. In addition to establishing an employee's decrease or loss of earning power or diminished employability, a claimant seeking payment from the Second Injury Fund must also establish that, after the second or subsequent compensable injury, an employee's combined permanent disabilities are *substantially greater* than the

permanent disability from the last compensable injury considered by itself.
Norris v. Iowa Beef Processors 867
22. Under Neb. Rev. Stat. § 48-128 (Reissue 1984), a combination of permanent disabilities is "substantially greater" than permanent disability from the second or subsequent injury when the resulting permanent disability from all causes combined is substantially greater than the disability resulting solely from the second or subsequent compensable injury.
Norris v. Iowa Beef Processors 867
23. For the combination of permanent disabilities necessary to sustain a claim against the Second Injury Fund, the prior permanent partial disability or disabilities must interact with the effects of the second or subsequent compensable injury and enhance the permanent disability that otherwise results from the later compensable injury alone.
Norris v. Iowa Beef Processors 867
24. In an appeal after rehearing in the Nebraska Workers' Compensation Court, the Supreme Court will consider only those issues or questions properly presented and disposed in the Nebraska Workers' Compensation Court.
Norris v. Iowa Beef Processors 867